DOCUMENT RESUME

ED 233 494 EA 016 061

TITLE	Teacher Tenure Appeals: Opinions 1-79 to 26-79 of the Secretary of Education. Also Includes 15-77A, 29-77; and 18, 22, 28, 38, and 39 of 1978. Volume IX.
INSTITUTION	Pennsylvania State Dept. of Education, Harrisburg.
PUB DATE	83
NOTE	408p.
PUB TYPE	Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC17 Plus Postage.
DESCRIPTORS	Behavior Standards; Board of Education Policy; Career Change; Competence; *Court Litigation; Due Process; Educational Malpractice; Elementary Secondary Education; Moral Issues; School Districts; *School Law; Social Behavior; *State Departments of Education; *Teacher Dismissal; Teacher Effectiveness; Teacher Evaluation; *Tenure
IDENTIFIERS	*Pennsylvania

ABSTRACT

Decisions by the Pennsylvania Secretary of Education contained in this publication are on appeals made by 33 professional school personnel against actions taken by their school boards. For each case, the employee (appellant) and district (appellee) are cited with a teacher tenure appeal number, the reason for the appeal, findings of fact that summarize the actions of the appellant and appellee, a discussion of the case citing relevant legal precedents, and the decision made by the secretary. At the end of the publication the 33 cases are categorized under causes for dismissal as follows: immorality, persistent and willful violation of school law, persistent negligence, professional employee status, incompetency, demotion in type of position, demotion in salary, accumulated sick leave and sabbatical, entitlement of back pay, and mandatory retirement age. (MLF)

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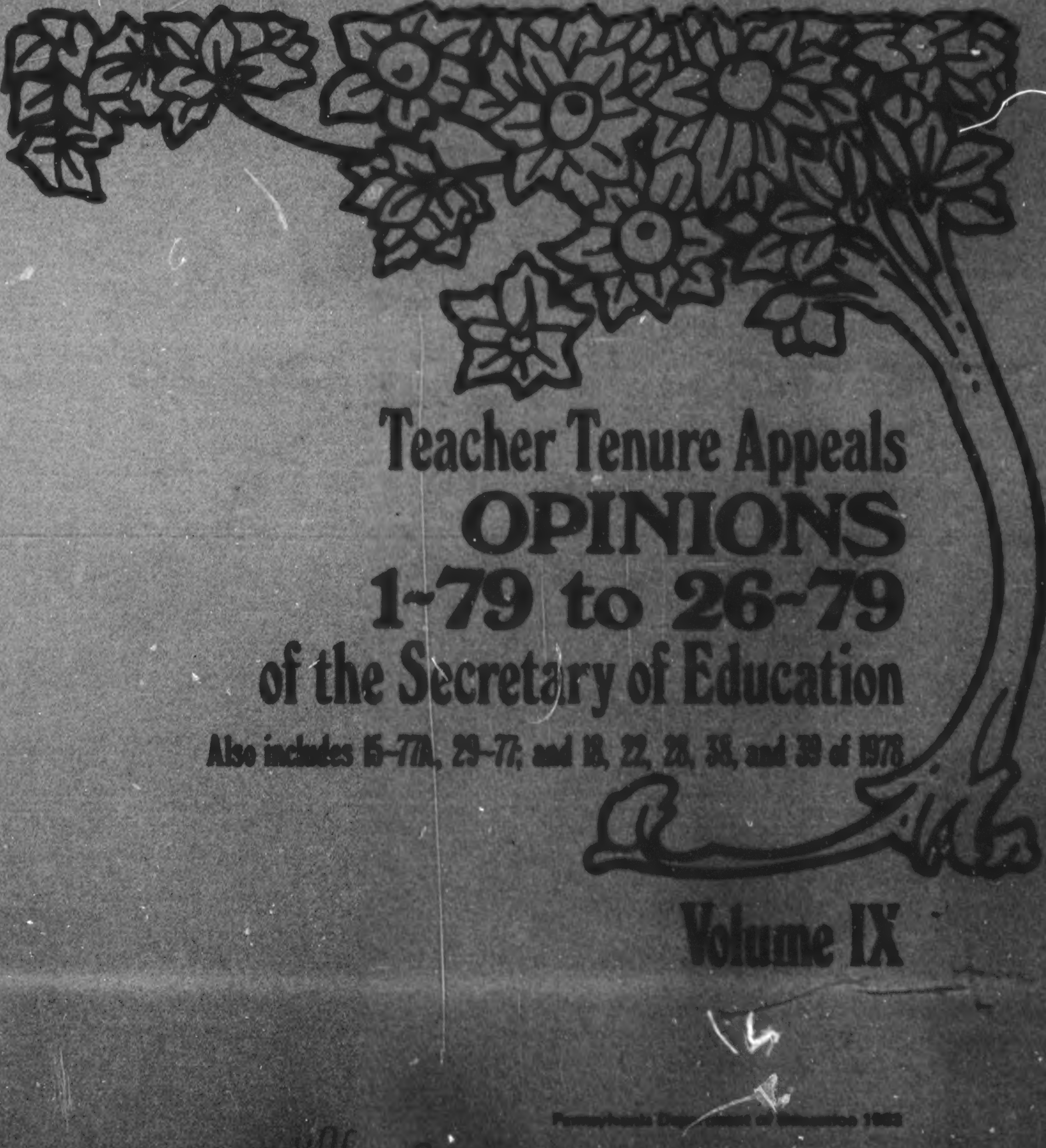

Teacher Tenure Appeals OPINIONS 1-79 to 26-79 of the Secretary of Education

Also includes 15-77A, 29-77; and 18, 22, 28, 38, and 39 of 1978

Volume IX

Pennsylvania Department of Education 1983

EA 016 061

Teacher Tenure Appeals
OPINIONS
1-79 to 26-79
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Volume IX

Under the
Public School Code,
Act of March 10, 1949,
P.L. 30, as amended

Commonwealth of Pennsylvania
Department of Education
1983

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IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

MARY BURKE OCCHIPINTI, :
Appellant :
:
v. : TEACHER TENURE APPEAL
: NO. 15-77A
BOARD OF SCHOOL DIRECTORS OF :
THE OLD FORGE SCHOOL DISTRICT, :
Appellee :

OPINION

The Appeal of Mary Burke Occhipinti, the Appellant herein, is before the Secretary of Education on remand by Order dated December 17, 1979 of the Commonwealth Court of Pennsylvania (No. 2715 C.D. 1978).

FINDINGS OF FACT

1. On May 31, 1977 Appellant was notified by the Superintendent of the Old Forge School District, that she was suspended from her teaching duties at the end of the school day because her 5 year interim teaching certificate had expired, she admitted she had not taken all the courses necessary to qualify for professional certification and that therefore she was not lawfully certificated to teach.

2. On July 5, 1977, following a hearing before the Board of School Directors, Appellant was notified by letter that the Board voted to dismiss her, effective May 31, 1977, because she was not lawfully certificated.

3. Appellant filed an appeal with the Secretary of Education on July 20, 1977.

4. In the summer following her dismissal, Appellant took the five courses she needed for certification and in September 1977 the Department of Education issued her a professional certificate.

5. Following a hearing, by Order dated October 26, 1978, the Secretary of Education dismissed Appellant's appeal and sustained the July decision of the school board dismissing Appellant for lack of certification.

6. On November 21, 1978, Appellant appealed the Secretary's decision to Commonwealth Court.

7. In its decision Commonwealth Court held that Petitioner (Appellant herein) did not receive a fair and impartial hearing before the local school board because the school district superintendent testified against Petitioner (Appellant herein) and participated in the deliberations following her hearing.

8. By Order dated December 17, 1979 the Commonwealth Court held as follows:

> ". . . the order of the Secretary of Education affirming the dismissal of Mary Burke Occhipinti is hereby reversed and the matter is remanded to the Secretary for remand to the Board of School Directors of the Old Forge School District for further proceedings consistent with this opinion."

DISCUSSION

It is clear in the opinion of the Commonwealth Court in this matter that the Court's order is based on its conclusion that Appellant did not receive a fair and impartial hearing before the Board of School Directors

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of the Old Forge School District. Occhipinti v. Board of School Directors of the Old Forge School District, ___ Pa. Commw. Ct. ___, 408 A.2d 1189 (1979). The court stated that the district superintendent both testified against Appellant and participated in the school board deliberations following the hearing and that this conduct deprived Appellant of a fair and impartial hearing. This due process violation required a reversal of the Secretary's Order which had affirmed the Board's decision to dismiss.

In rendering its opinion Commonwealth Court cited Department of Education v. Oxford Schools, 24 Pa. Commw. Ct. 421, 356 A.2d 857 (1976) as controlling. The same due process violation occurred in Oxford: the superintendent testified at the school board hearing and participated in the board's deliberations. On appeal the Secretary of Education reversed the board's decision and reinstated the teacher. On further appeal the Commonwealth Court reversed the Secretary's decision as to reinstatement with these words:

> We do not agree that [the Secretary] properly ordered reinstatement. . . This Court, as well as our Supreme Court, has generally adhered to the view that where procedural defects have occurred, the proper remedy is a remand for proper procedural disposition. Id., 356 A.2d at 862

Quoting Donnon v. Downingtown Civil Service Commission, 3 Pa. Commw. Ct. 366, 283 A.2d 92 (1971), the Court stated: "Remand for a proper hearing regardless of the result, insures the integrity of administrative process." Id., 356 A.2d at 862.

We are bound by Oxford and by the clear direction in the Court's December 17, 1979 Order in this matter. Although Appellant received a procedurally improper hearing below, the school board otherwise acted properly. The board acted as if felt it was required by the constraints of Sections 1201 and 1202 of the Public School Code, 24 P.S. §§12-1201, 12-1202, which mandate valid certification as a pre-condition to employment as a teacher.

The Commonwealth Court's opinion in this matter did not discuss nor dispute the factual findings that at the time of dismissal Appellant's five year interim certificate had expired and that as of the expiration date Appellant had still not taken the five courses she needed for permanent certification nor had she offered any reasons for her failure to do so. Appellant's later completion of the necessary courses for permanent certification does not alter the facts upon which the board based its decision as of the time of the hearing. Neither do later developments alter the Secretary's review of the board's action as of the time the action was taken.

Accordingly, we make the following:

ORDER

AND NOW, this 29th day of April 1981, it is hereby ordered that the appeal of Mary Burke Occhipinti is remanded to the Board of School Directors of the Old Forge School District for further proceedings to cure the improper hearing in a manner consistent with the opinion of the Commonwealth Court in this matter, 408 A.2d 1189 (1979).

Robt G. Scanlon

Robert G. Scanlon
Secretary of Education
Pennsylvania Department of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

CHARLES R. HACKENBERRY, JR., :
Appellant :
:
v. : Teacher Tenure Appeal
: No. 29-77
BOARD OF DIRECTORS, :
MIFFLIN COUNTY SCHOOL DISTRICT, :
Appellee :

OPINION

Appellant, Charles R. Hackenberry, Jr., has appealed, under Section 1131 of the Public School Code of 1949, his suspension and subsequent dismissal on the ground of immorality by the Board of Directors of the Mifflin County School District (hereinafter referred to as the Board) as a professional employee of the District.

FINDINGS OF FACT

1. Appellant was a professional employee of the Mifflin County School District. (NI, 14)*

2. By letter, dated September 18, 1974, Appellant was suspended from his position as a teacher by District Superintendent Walk on the basis of charges that he had violated three (3) sections of the "Controlled Substance, Drug, Device and Cosmetic Act." (Board's Ex. 2)

3. In September of 1974, a criminal prosecution for violation of the Controlled Substance, Drug, Device and Cosmetic Act was initiated against Appellant. (NII, 34, 32, 43)

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* Hereinafter "NI" will refer to notes of testimony before the Board of October 13, 1977, and "NII" will refer to notes of October 19, 1977.

4. The prosecution was a consequence of search of a house in Lewistown conducted on or about September 1974 by police officers of the Borough of Lewistown, Pennsylvania.

5. Appellant, his wife and children were in the house when it was searched by the police. (NII, 35)

6. A substance believed by the police to be marijuana was found during the search. (NII, 36, 37)

7. The substance was in fact determined to be marijuana. (NI 89, 90)

8. In Appellant's criminal prosecution a suppression hearing was held which led to a March 25, 1975 decision by the Court of Common Pleas suppressing the marijuana as having been obtained unlawfully by use of a defective search warrant and impounding the record and adjudication in the criminal prosecution. (NII, 60)

9. Both parties to the criminal prosecution appealed the March 25, 1975 decision; both appeals were terminated by a judgment of non pros on March 8, 1976.

10. By letter of August 10, 1976, Appellant was given notice of a hearing to be held August 23, 1976 relative to his suspension and also a charge of immorality for having possession of "quantities of marijuana plants." (Exhibit B)

11. Said hearing was not held because Appellant brought an Action in Equity on August 16, 1976 (Civil Action No. 1481 of 1976) in the Court of Common Pleas of Mifflin County against the Mifflin County School District Board of Directors seeking to enjoin the Board's use of the suppressed evidence against Appellant at the dismissal hearing.

12. By adjudication, dated February 23, 1977, the Court of Common Pleas of Mifflin County found that it was without jurisdiction to enjoin the use of the suppressed evidence in the hearing before the Board because Appellant had an adequate remedy at law in that he could appeal any alleged unlawful use of the evidence by the Board to the Commonwealth Court.

13. Although not necessary to its ruling, the Court in its opinion stated its position that the purpose of the exclusionary rule would not be served by allowing its application to suppress evidence in a civil dismissal proceeding. (Court of Common Pleas of Mifflin County, Civil Action No. 1481 of 1976, Opinion page 2 and footnote 3)

14. In September of 1977, by a pleading styled "Petition for Assumption of Jurisdiction," Appellant requested the Secretary of Education to intervene in his case due to the failure of the Board to schedule a hearing.

15. The Board gave Appellant his hearing in October 1977 after it was able to obtain from the Court of Common Pleas of Mifflin County the physical evidence (marijuana) which had been impounded in Appellant's criminal prosecution.

16. The only charge brought by the Board against Appellant consisted of possession of the aforesaid marijuana.

17. The evidence of possession of marijuana used before the Board was the same evidence that had been suppressed by the Court of Common Pleas of Mifflin County in the criminal case. (NI, 27)

18. On December 16, 1977, after the hearing before the Board, the Board sustained Appellant's suspension and also dismissed him. (NII, 127-133)

19. By a pleading styled "Notice of Appeal," dated January 17, 1978, Appellant appealed his suspension and dismissal to the Secretary of Education.

20. Appellant thereafter filed an "Amended Petition of Appeal" enumerating his reasons for appealing.

21. A hearing on the Appeal was held on August 28, 1978.

DISCUSSION

The major issue presented by this appeal is whether evidence, which a court has ruled inadmissable in a criminal proceeding against a professional employee, may be used by a school district against the professional employee in a subsequent dismissal hearing. We hold that it may as discussed later in this opinion.

Appellant also raises other questions regarding procedures at the dismissal hearing and the failure of the Board to grant him a timely hearing on his suspension. We will deal with these questions first. We note that there was, as Appellant argues, a three-year period between Appellant's suspension without pay and the hearing which the Board ultimately granted to him. It is the School Board's duty to schedule a hearing in a timely fashion when an employee has a statutory right to the hearing. Although Appellant did not request a hearing, the court has stated it is not an excuse that an employee has made no specific request for a hearing. Coleman v. Board of Education of School District of Philadelphia, 477 Pa. 414, 383 A.2d 1275, 1280 (1978). However, the Board in this case argues that the delay was not due to failure to request a hearing but was due to Appellant's own actions in moving to suppress the evidence in his criminal trial and then, after successfully suppressing it there, pursuing further legal action to enjoin the Board from using the suppressed evidence at his civil dismissal hearing.

Although the Board may reasonably have felt compelled to postpone its hearing pending a determination in the legal actions concerning admissibility of evidence, it is our opinion that notice to a professional employee specifying the acts that the Board believes the employee to have done, and specifying the harm the Board felt the employee's continued presence in the school would cause, along with a date set for a hearing, should be issued in a timely fashion. Clearly the Board in this case felt it was pursuing the matter as efficiently as it could given the criminal actions occurring and the action to enjoin the Board which addressed the same evidence disputed in the criminal action. The Board scheduled hearings which did not occur because of Appellant's action to enjoin use of evidence and also due to the court's impoundment order against release of evidence. Appellant did not request a Board hearing until three years after his suspension nor did he take any action in Common Pleas Court to mandamus the Board to grant him a local agency hearing on suspension for that three years nor for three years did he ask the Secretary of Education to compel the district to grant him a hearing. The Appellant cannot now complain of the Board's failure to schedule a hearing in a more timely fashion.

Appellant also raises procedural questions regarding lack of specificity in the Board's charges against him, bias on the part of Board members, bias on the part of the Board's solicitor, improper admission of hearsay testimony, improperly permitting a police officer to state an opinion relating to the quantity of marijuana seized, failure of the solicitor to allow voir dire of Board members, improper admission of a newspaper article into evidence and failure of the Board to make findings of fact in its decision. These issues have been addressed by existing case law and it is our finding that Appellant's arguments are without merit. Lucciola v. Commonwealth, Secretary of Education, 360 A.2d 310, 25 Pa.Commw.Ct. 419 (1976); McCoy v. Lincoln Intermediate Unit No. 12, 38 Pa.Commw.Ct. 29, 391 A.2d 1119 (1978); Nagy v. Belle Vernon Area School District, ___ Pa.Commw.Ct. ___, 412 A.2d 172 (1980); Ceja v. Unemployment Compensation Board of Review, ___ Pa. ___, 427 A.2d 631 (1981).

Appellant also raises a question as to the Board's authority to suspend him in 1974. The implied authority to suspend has been found in instances where a school district acts in the interest of the welfare of the children. Kaplan v. School District of Philadelphia, 388 Pa. 213, 130 A.2d 672 (1957). The court has further noted that the basis for such implied power must fall when the subsequent discharge is reversed as improper. Shearer v. Secretary of Education, ___ Pa.Commw.Ct. ___, 424 A.2d 663 (1981) It is our opinion that the district in this instance reasonably decided to remove Appellant from the classroom in the interest of the children's welfare because of the severity of the drug charges filed against him. The subsequent dismissal of the Appellant is also found herein to be proper and based on substantial evidence as discussed below.

We must now turn to the question of whether the evidence of possession of marijuana was properly admitted by the Board in the dismissal hearing.

The Court of Common Pleas of Mifflin County ruled in Appellant's criminal proceeding that the evidence to be used against him regarding the charge of possession of marijuana was illegally seized. This ruling was based upon a technical deficiency in the search warrant. Subsequently the same court ruled it had no jurisdiction to suppress the evidence in the hearing before the Board. The Secretary of Education must therefore now determine whether the evidence was properly admitted against Appellant in the civil dismissal proceedings before the School Board.

The exclusionary rule of evidence has been traditionally applied only in criminal cases to exclude evidence seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The courts have also made the rule applicable to certain proceedings which are referred to as being of a "quasi-criminal" nature. See Commonwealth v. One 1958 Plymouth Sedan, 414 Pa. 540, 201 A.2d 427 (1964); One 1958 Plymouth Sedan, 280 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965); Pennsylvania Liquor Control v. Leonardziak, 210 Pa. Super. 511, 223 A.2d 606 (1967); Glass v. Commonwealth Department of Transportation, Bureau of Traffic Safety, 460 Pa. 362, 333 A.2d 768 (1975); United States v. Calandra 414 U.S. 338, 94 S.Ct. 613 (1974) and U.S. v. Janis, 428 U.S. 433, 96 S.Ct. 3021 (1976).

In each case the court's key question has been whether the hearing is quasi-criminal in nature, so as to fall within the reasoning of Sedan and Leonardziak, supra, or whether the case is purely civil. Speaking of the exclusionary rule in U.S. v. Janis, 428 U.S. 433, 96 S.Ct. 3021 (1976), the United States Supreme Court refused to extend its application to civil matters stating it "never has applied it [the exclusionary rule] to exclude evidence from a civil proceeding, Federal or State." The United States Supreme Court in the earlier One 1958 Plymouth Sedan, supra, emphasized that its decision therein rested on the distinction that the proceeding in question was quasi-criminal. In the Pennsylvania Supreme Court decision in that case, Commonwealth v. One 1958 Plymouth Sedan, 414 Pa. 540, 201 A.2d 427 (1964), the Pennsylvania Court also stated its opinion that the exclusionary rule is inapplicable to purely civil proceedings.

A teacher dismissal proceeding is conducted pursuant to the Public School Code. It is a purely civil matter.[1] We note this opinion is shared by the Court of Common Pleas ruling in this matter at the suppression hearing. (See Findings of Fact 11, 12 and 13.) The purpose of the exclusionary rule is not advanced by allowing its application in a teacher dismissal action. Therefore, the evidence in question was properly admitted against Appellant. The Board properly considered the evidence and found substantial evidence, reflected in the record before the Secretary, in support of the suspension and subsequent dismissal. Accordingly, we enter the following:

---

[1] The California Courts have addressed this precise question--extension of the exclusionary rule to a teacher dismissal hearing on charges of immorality--and found the rule should not be applied in dismissal proceedings. Governing Board of The Mountain View School District of Los Angeles County v. Frank Hamilton Metcalf, 36 C.A. 3d 546, 111 Cal. Rpts. 724 (1974)

ORDER

NOW, this 4th day of January , 1982, it is hereby ORDERED AND DECREED that the decision of the Board of School Directors of the Mifflin County School District is upheld and the Appellant's Petition of Appeal is dismissed.

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

WILLIAM HARR, Appellant	:	
v.	:	Teacher Tenure Appeal
CARMICHAELS AREA	:	No. 18-78
SCHOOL DISTRICT, Appellee	:	

OPINION

William Harr, Appellant herein, has appealed from a decision of the Carmichaels Area School District, dismissing him as a professional employee.

FINDINGS OF FACT

1. Mr. Harr, Appellant, was a professional employee of the Carmichaels Area School District (hereinafter district).

2. For the last six years of employment with the District he was principal of the Carmichaels Area Junior-Senior High School. (N.T. 219)

3. For the preceding ten years Appellant was a science teacher in the district. (N.T. 119-120)

4. Appellant was on sabbatical leave for the first semester of the 1977-78 school year. (N.T. 17)

5. On January 19, 1978, at a school board meeting, Appellant was suspended without pay as of the beginning of the second semester of the school year 1977-78. (N.T. 121)

6. On February 10, 1978, Appellant was notified, by certified letter, of a statement of charges against him and that a dismissal hearing had been scheduled to hear the charges. (N.T. 121)

7. The charges filed against Appellant and several clarifying letters sent thereafter alleged that Appellant had violated Sections 511 and 610 of the Public School Code based on specific purchases made with monies from the Student Activities Account General Fund. (N.T. 14, 15)

8. On February 28 and March 21, 1978 a dismissal hearing was held before the School Board of the Carmichaels Area School District (hereinafter board).

9. At the board hearing of February 28, 1978, Appellant was charged pursuant to Section 1122 of the School Code with immorality and persistent and willful violation of the school laws based on the purchases set forth in the statement of charges. (N.T. 26)

10. In the fall of 1977, Appellant, in his capacity as principal, received an advertisement for a grandfather clock kit from the Emperor Clock Company. (N.T. 220-221)

11. In January 1977, Appellant ordered the clock kit using a check drawn on the high school Activities Account and signed by the bookkeeper of that fund. (N.T. 39, 222, 215)

12. The clock kit was delivered in the spring, 1977, to the Carmichaels Area Junior-Senior High School. (N.T. 181, 222)

13. In June, 1977 Appellant ordered a second clock kit and a butler table kit from the Emperor Clock Company. (N.T. 40, 225)

14. The June purchases were made by a check requested by Appellant, drawn on the high school Activities Account and signed by the bookkeeper of that fund. (N.T. 215, 227)

15. In the summer of 1977, the June purchases were delivered, in part, to the Carmichaels Area Junior-Senior High School together with a post office claim slip for the remaining packages. (N.T. 181, 226)

16. Appellant claimed the remaining packages which he initially took to his residence; Appellant delivered the packages in November, 1977, unopened, to the Carmichaels Area Junior-Senior High School. (N.T. 226, 114, 192)

17. In March, 1977 Appellant purchased a stereo from the Radio Shack using a check drawn on the high school Activities Account and signed by the bookkeeper of that fund. (N.T. 40, 236)

18. The stereo was delivered to the Junior-Senior High School and was kept in plain view in Appellant's office in the Junior-Senior High School until he took it to his home the in the summer before commencing his sabbatical leave. (N.T. 234-236)

19. The setero was used in at least one student function, the senior picnic. (N.T. 235, 201)

20. The stereo was returned to the district in November, 1977. (N.T. 140)

21. Appellant testified that he made all of the purchases for the district but that subsequent to the purchase of the first clock kit he decided to keep the kit himself, therefore, reimbursed the Activities Account and purchased a second clock kit for the district's shop class. (N.T. 223, 226)

22. Appellant discussed the purchases with district staff at various times. (N.T. 207, 221, 222)

23. The shop teacher testified that he discussed at least one clock purchase with Appellant and that he may have approved the purchase. (N.T. 207)

24. All items purchased were delivered to the Junior-Senior High and kept in plain view. (N.T. 225, 193, 112)

25. In November 1977 and January 1978, Appellant met with the district superintendent and other district personnel, at the superintendent's request. to discuss the above purchases. (N.T. 95, 117, 118, 237-238)

26. Appellant, as principal of the Carmichaels Area Junior-Senior High School, was responsible for supervision of the monies in the Activities Account General Fund from which the purchases were made. (N.T. 108, 215, 224)

27. The bookkeeping records of the Activities Account, including the General Fund, were kept by William Nesmith, the bookkeeping and business teacher for the Carmichaels Area Junior-Senior High School. (N.T. 210)

28. Mr. Nesmith signed the checks to purchase the clock kits, butler table and stereo. (N.T. 215)

29. There were no written school board regulations or policies governing the use of the Activities Account General Fund. (N.T. 108, 109, 112)

30. Appellant was given no oral directives on the use of the Activities Account. (N.T. 109, 111)

31. In years prior to 1977-78 various other items of school property were purchased with funds from the Activities Account General Fund. (N.T. 110, 174, 175, 232)

32. The Activities Account General Fund includes monies deposited from the 12 or 14 clubs in the Junior-Senior High School.

33. The deposits to the Activities Account General Fund were made by placing money in envelopes, cash boxes, candy tins, other containers or placing it loose in a bag kept behind the desk of the principal's secretary; there was no requirement that deposits be identified. (N.T. 211, 215, 216, 253)

34. Mr. Nesmith, as bookkeeper, testified that when he received unidentified deposits he simply added them to the General Fund. (N.T. 215, 216)

35. An audit of the district's Activities Account, including the General Fund, was conducted by Milanovich and Company, Inc., a certified public accounting firm, for the 1975-76 school year. (N.T. 46)

36. Following the 1975-76 audit, the district was notified by the auditors that controls were needed for handling the funds in the Activities Account especially regarding the identification and documentation of cash receipts. (N.T. 47-48)

37. Controls for handling the Activities Account General Fund were not developed by the district following the 1975-76 audit.

38. An audit of the district's Activities Account, including the General Fund, was again conducted by Milanovich and Company, Inc. for the 1976-77 school year. (N.T. 33, 48)

39. Following the 1976-77 audit, the auditors again notified the district that controls were needed for handling the receipts in the Activities Account. (N.T. 50)

40. Numerous unexplained debits and credits were discovered in the audit of the Activities Account; the purchases requested by Appellant were among the items questioned.

41. It was impossible to determine by a review of the records of the Activities Account General Fund precisely what monies were paid into or out of the Fund, when all the various transactions occurred, the purposes of the transactions, or who made the transactions. (N.T. 50-55, 108, 211, 223)

42. On March 28, 1978, Appellant was dismissed from his position as a professional employee of the district on the basis of misuse of school funds and converting school property to his own use.

43. On April 13, 1978, Appellant filed an Appeal with the Secretary of Education pursuant to Section 1131 of the Public School Code.

44. A hearing on the Appeal was held on June 28, 1978 before a Hearing Examiner acting on behalf of the Secretary of Education.

DISCUSSION

This Appeal presents three issues: (1) did the board act properly in suspending Appellant; (2) was the notice of charges received by Appellant prior to his dismissal hearing legally sufficient; and (3) did the board have substantial evidence to support the charges for which Appellant was dismissed.

We conclude that: (1) the indefinite suspension of Appellant prior to a hearing, without pay and without notice of charges was not proper; (2) that the notice of charges received by Appellant was legally sufficient; and (3) that the record does not contain substantial evidence in support of the charges against Appellant. Therefore, we reverse the decision of the board dismissing Appellant and order that he be reinstated effective the first day of the second semester of the 1977-78 school year, the date of his improper suspension.

Suspension is expressly permitted under Section 1124 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1124 (hereinafter referred to as the Public School Code). It has also been recognized, in limited circumstances, as being within the inherent authority of a school board provided there is just cause for the suspension and that it is disciplinary and/or necessary for the welfare of students. Kaplan v. School District of Philadelphia, 388 Pa. 213, 130 A.2d 672 (1957); Mitchell v. the School District of Philadelphia, Teacher Tenure Appeal No. 28-78 (1978). The district herein makes no claim that their suspension action was taken pursuant to a cause enumerated in Section 1124 on suspension. Therefore, it is presumably under the claim of inherent authority to suspend that the board has acted in this matter.

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It is the opinion of the Secretary that the facts of the instant case do not support the conclusion that the board acted properly in suspending Appellant. The inherent authority of a school board to suspend a professional employee for a reason not enumerated in Section 1124 of the School Code has been very narrowly construed. In the case before us the board suspended Appellant without pay with no prior notice or hearing. Appellant did not receive a statement of charges until over three weeks after the suspension decision by the board. A hearing was not granted until Appellant had been suspended without pay for six weeks. There is no evidence that Appellant was suspended for disciplinary reasons or because he presented a threat to students. Neither of those assertions would, in fact, be arguable in light of the undisputed fact that at the time the suspension decision was made, Appellant was on sabbatical leave and therefore was already physically absent from his position and not in contact with students.

Accordingly, we conclude that the board abused its inherent authority to suspend professional employees when it summarily removed Appellant from his position as principal.

The second issue before the Secretary is whether the charges which Appellant ultimately received from the board, prior to his dismissal hearing, were legally sufficient. Addressing this question Commonwealth Court has stated:

> As long as the substance of the charges furnished the professional employee refers to one of the valid causes for dismissal under Section 1122, statutory and constitutional requirements are satisfied. Lucciola v. Commonwealth, Secretary of Education, 25 Pa. Commw. Ct. 419, 360 A.2d 310, 312 (1976)

Appellant herein received a letter from the board which detailed several specific acts (referred to above in Findings of Fact 11-17) which the board considered improper. The letter additionally alleged that because of these acts Appellant had violated two enumerated sections of the School

Code. Appellant is correct in asserting that several letters were exchanged between the parties before the enumerated sections of the School Code were correctly cited to Appellant. It is also correct that the board's charges did not specifically state that violation of the enumerated sections constituted persistent and willful violation of the school laws, a cause enumerated for dismissal under Section 1122 of the School Code. However, it is the opinion of the Secretary that the statements received by Appellant were legally sufficient to very accurately apprise him of the alleged acts which the board intended to present as cause for his dismissal and against which he would have to defend himself. Accordingly we find that Appellant was not denied due process and the board did not commit a due process error requiring reversal of their decision.

The third issue before the Secretary is whether the board had substantial evidence to support a dismissal for persistent and willful violation of the school laws or immorality based on Appellant's management and use of funds in the Activities Account General Fund. The presence of substantial evidence necessary to justify dismissal "is determined by whether a reasonable man acting reasonably might have reached the same decision reached by the board." Penn Delco School District v. Thomas Urso, 33 Pa. Commw. Ct. 501, 382 A.2d 162 (1978), citing Landi v. West Chester Area School District, 23 Pa. Commw. Ct. 586, 353 A.2d 895 (1976).

The board herein, after several clarifying letters, claimed that Appellant violated Sections 610 and 511 of the Public School Code, 24 P.S. §§6-610, 5-511. Section 610 addresses the use of school funds by the board of school directors:

> "The board of school directors in every school district shall have the right to use and pay out, in the manner hereinprovided, any funds of the district for any and all purposes therein provided, subject to all provisions of this act. The use or payment of any

> public school funds of any school district, in any manner or for any purpose not provided in this act, shall be illegal." 24 P.S. §6-610, emphasis added

The relevance of this section to Appellant's management of the Activities Account General Fund is no where explained by the district. Nor did the district explain how Appellant, who is not a board member, could violate a Public School Code section which governs the action of school board members. It is the finding of the Secretary that Appellant, a school principal, could not act in violation of Section 610. Arguably the board could violate this section by knowingly allowing a district employee to misuse funds. However, only the board's violation of its duty and not the acts of the employee would sound as a claim under Section 610. Appellant cannot be dismissed for violation of a Public School Code section which has no application to his acts. Even assuming arguendo that Appellant could be held to be an agent for the board in handling the fund in question, and that he is thus subject to Section 610, it must then be proven that Appellant as agent had notice of the manner in which the board expected him to manage and use the fund. As explained below, the board can offer no such proof.

The district also argued that Appellant violated Section 511 of the Public School Code, 24 P.S. §5-511: Rules and regulations governing athletics, publications and organizations. Although the district does not specify how Appellant violated this section or what particular subsection is involved in the alleged violation, subsection (a) of Section 511 does authorize a school board to prescribe, adopt and enforce rules and regulations regarding the supervision and financing of school clubs and to provide for the dismissal of any professional employee who violates such rules or regulations. The board thus had the authority to issue rules and regulations governing Appellant's management and use of the Activities Account General Fund. Under Section 511 the board could also dismiss any professional employee who violated the rules or regulations adopted by the board. Commonwealth Court has held that violation of a school regulation can be a willful and persistent violation of the school laws within the meaning of Section 1122 of the Public School Code, 24 P.S. §11-1122, on dismissal. Board of Directors of Ambridge School Directors v. Snyder, 346 Pa. 103, 29 A.2d 34 (1943).

We presume that the board herein argues that the alleged violation of Section 511 is a persistent and willful violation of the school laws and therefore provides grounds to dismiss Appellant pursuant to Section 1122. However, the district superintendent, the Activities Account bookkeeper, the account auditor, and the Appellant all testified on the record that the district had no written or oral rules or regulations regarding management and use of the Activities Account. Nonexistent regulations cannot be school laws. Appellant cannot be held in violation of a rule or regulation which does not exist. Therefore, we find Appellant did not violate Section 511 nor can the board dismiss him under Section 1122 for the persistent and willful violation of a school law.

The final argument to be addressed is whether Appellant's conduct, although not a violation of school law, constitutes immorality, another valid cause for dismissal enumerated in Section 1122 of the Public School Code, 24 P.S. §11-1122. Immorality has been defined as "a course of conduct as offends the morals of the community and is a bad example to the youth, whose ideals a teacher is supposed to foster and elevate." Horosko v. Mount Pleasant Township School District, 335 Pa. 369, 6 A.2d

866 (1939). The misappropriation of funds has been specifically held to constitute immorality under the Public School Code as defined in Horosko. Appeal of Flannery, 406 Pa. 515, 178 A.2d 751 (1962).

The district argues that Appellant used Activities Account General Fund monies to purchase the items in question for his own use and that he converted school property for his own use. If this contention were supported by substantial evidence on the record the Secretary would be compelled to uphold the district. However, it is the opinion of the Secretary that the record does not contain substantial evidence as would allow a reasonable man acting reasonably to reach the same decision as the board. Penn Delco School District v. Urso, supra.

The testimony of the district's own witnesses confirmed that in 1976-77, the year in question, Appellant managed the Activities Account General Fund in the same manner as it had been managed in the preceding years. The district superintendent, auditor and bookkeeper testified there were no rules or regulations, oral or written, regarding the management and use of the General Fund which Appellant could have violated. With respect to the purchase of the two clock kits, butler table kit, and stereo the district's witnesses stated that all the items were delivered to the district, some of the purchases were discussed with district personnel prior to purchase, and payment was made by checks which the Activities Account General Fund bookkeeper signed. All the items except one of the clock kits were used by the district for district purposes. Appellant states that at some time after the purchase of one clock kit, when it was too late to use the kit as a class project, the Appellant decided to reimburse the General Fund for the clock, build the kit himself, and order a second kit for a shop class project. There is no evidence that Appellant did not reimburse the General Fund. The district superintendent, the bookkeeper and the account auditor all testified that by review of records it was impossible to determine precisely what money went in and out of the General Fund. The auditor testified there were numerous debits and credits which he could not explain by a review of the records and that Appellant could have reimbursed the fund.

Considering the testimony of the district's own witnesses, it is the finding of the Secretary applying the substantial evidence test set forth in Urso, that a reasonable man acting reasonably could not decide that Appellant used the General fund to purchase items for his own use or that he converted school property to his own use. Therefore, we conclude the charge of immorality cannot support Appellant's dismissal. Accordingly, we make the following:

ORDER

AND NOW, this 21st day of February, 1980, it is hereby Ordered and Decreed that Appellant, William Harr, is reinstated to his position as a principal in the Carmichaels Area School District without loss of pay effective the date of his improper suspension.

Robert G. Scanlon

Robert G. Scanlon
Secretary of Education

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IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

REBECCA RAYBUCK, :
Appellant :
:
v. : Sick Leave Appeal No. 22-78
:
DUBOIS AREA SCHOOL DISTRICT, :
Appelle :

OPINION

The above cited appeal raises one issue: Can a school district calculate the amount of sick leave earned by a professional employee by prorating days earned on the basis of number of months actually worked in any given school year?

FINDINGS OF FACT

1. Appellant is a professional employee of the DuBois Area School District.

2. At the end of the 1976-1977 school year, Appellant had accumulated fourteen (14) sick days.

3. On February 2, 1978 Appellant notified the Superintendent of the DuBois Area School District that she planned to take leave of her teaching position beginning February 20, 1978.

4. In her February 2, 1978 correspondence Appellant stated that she wished to utilize her accumulated sick days beginning February 20 until such time as they expired. At the time of expiration she wished to begin maternity leave.

5. In the 1977-1978 school year, prior to February 20, 1978, Appellant had used four (4) sick days.

6. Upon receipt of Appellant's letter, the School District calculated her accumulated sick days by prorating her 1977-1978 entitlement on the basis of the number of months worked in the school year and thus credited Appellant with a total of six (6) sick days for the 1977-1978 school year. The School District then subtracted the four (4) days Appellant had used (Fact No. 5), added the fourteen (14) days accumulated by the end of the 1976-1977 school year (Fact No. 2) and credited Appellant with a total entitlement of sixteen (16) sick days.*

7. Appellant contends that she was entitled to a full ten (10) sick days for the 1977-1978 school year and not a prorated amount based on number of months worked. Appellant therefore argues her total entitlement is ten (10) days minus four (4) used in 1977-1978 prior to her leave (Fact No. 5) added to fourteen (14) previously accumulated (Fact No. 2) for a total of twenty (20) sick days.

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*The Secretary of Education has been notified by Stipulation of both parties that the dispute over the deduction of a personal day which the District counted as a sick day has been properly settled by arbitration and is no longer at issue between the parties. The Secretary notes, for future reference, that the Department of Education has no jurisdiction under Section 1154 of the School Code to settle disputes over computation of personal days.

8. Appellant filed this Appeal with the Secretary of Education pursuant to Section 11-1154 of the School Code, 24 P.S. §11-1154, on May 4, 1978.

9. The Answer to Appellant's Appeal was filed by the School District with the Secretary of Education on May 12, 1978.

10. The brief on behalf of the Appellant was received by the Legal Division of the Pennsylvania Department of Education on June 16, 1978.

11. The brief on behalf of the Appellee School District was received by the Legal Division of the Pennsylvania Department of Education on June 26, 1978.

12. The Stipulation of Facts submitted by Appellant and Appellee was received by the Legal Division of the Pennsylvania Department of Education on December 29, 1978.

DISCUSSION

The only question raised in this appeal is whether a school district can calculate the amount of sick leave earned by a professional employee by prorating days earned on the basis of months actually worked in any given school year. The answer to this question depends upon an analysis of Section 1154 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 29 P.S. §11-1154. Section 1154 provides, in part, as follows:

> "(a) In any school year whenever a professional or temporary professional employee is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employee for each day of absence the full salary to which the employee may be entitled as if said employee were actually engaged in the performance of duty for a period of ten days. Any such unused leave shall be cumulative from year to year in the school district of current employment or its predecessors without limitation. All or any part of such accumulated unused leave may be taken with full pay in any one or more school years. No employee's salary shall be paid if the accidental injury is incurred while the employee is engaged in remunerative work unrelated to school duties."

In Official Opinion No. 187 (1959), the Attorney General interpreted Section 1154 as requiring that each teacher be credited with ten (10) sick days at the beginning of each school year. Under this interpretation, a teacher without any accumulated sick leave would be entitled to ten sick days even if the illness or accidental injury befell the teacher during the first ten days of the school year.

It is our opinion that when the ten days of sick leave are credited to an employee at the beginning of the school year, it is understood as a condition for that sick leave entitlement that the employee work a normal year of service, if able to do so. In other words, sick leave entitlement may be prorated for those who serve only part of a school year although able to serve the normal year (as in the case of sabbatical leave). However, sick leave entitlement may not be prorated where a professional employee starts work at the beginning of a school year and must withdraw because of illness or accidental injury. Under this interpretation, an employee who cannot complete the school year because of health is entitled to the ten sick days credited to the employee at the beginning of the school year.

In its Answer to the Complaint filed with the Secretary of Education in this case, the school district claims that it has a long-established policy of prorating sick days for professional employees who work for only a portion of the school year and that the proration of Appellant's sick days was consistent with that policy. As outlined above, the school district may not prorate sick days for professional employees who fail to complete a school year because of illness or accidental injury. If the school district is prorating the sick days of professional employees who cannot complete a school year because of health reasons, then its policy violates Section 1154 of the Public School Code of 1949, 24 P.S. §11-1154.

The only remaining question is whether pregnancy-related disability should be treated as an illness or accidental injury under Section 1154 of the Public School Code of 1949, 24 P.S. §11-1154. In Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 126 (1977) the court determined that a school district's refusal to pay accumulated sick leave benefits to pregnant teachers constituted an unlawful discriminatory practice. In reaching this determination, the court stated that "...while pregnancy may not be illness or accidental injury, it must under Pennsylvania law be treated as any other physical infirmity." It is our opinion that pregnancy and childbirth must be treated in the same fashion as other temporary disabilities. For this reason, a professional employee who requests a leave for childbirth may not have her sick leave entitlement prorated by the school district.

The school district, however, contends that the Appellant requested childrearing as opposed to childbearing leave. We agree with the school district that a clear distinction exists between childrearing and childbearing leaves of absence. (See 16 Pa. Code §41.104). The school district, however, is asking the Secretary to presume that Appellant's leave was not due to a pregnancy-related disability. We will not make such a presumption without evidence supporting the district's contention that Appellant was not disabled.

The Appellant wrote to the Superintendent on February 2, 1978, stating that she desired to use her earned sick days beginning February 20, 1978 followed by a maternity leave. This request was accompanied by a note from the Appellant's physician as follows:

> "The above named patient has been advised to begin her maternity leave on 17 Feb. 78. This will be a temporary disability."

This note indicates that for at least some period of time Appellant's physician decided Appellant was disabled. This contradicts the school district's contention that the leave requested by the Appellant, which commenced on February 20, 1979 was childrearing leave.

In summary, the Appellant must be credited with the sick days she earned while on leave due to the temporary disability associated with pregnancy and childbirth. The school district has not proved that the Appellant requested and was permitted to take a leave of absence for childrearing, as opposed to a leave of absence due to pregnancy-related disability and childbearing. Accordingly, we make the following:

ORDER

And now, this 19th day of December, 1979, the DuBois School District is hereby ordered to credit the Appellant with 20 days of sick leave as of February 20, 1978.

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

HOWARD H. MOON, :
Appellant :
:
v. : Teacher Tenure Appeal No. 28-78
:
BOARD OF SCHOOL DIRECTORS :
OF THE BETHEL PARK SCHOOL :
DISTRICT, :
Appellee :

OPINION

Howard H. Moon, Appellant herein, has appealed from a decision of the Board of School Directors of the Bethel Park School District, dismissing him from employment by the district as a result of the district's elimination of Dr. Moon's position, Director of Curriculum and Instruction.

FINDINGS OF FACT

1. Howard H. Moon, Appellant, is a professional employee, who holds a valid letter of eligibility for superintendent. Dr. Moon was first employed by the Bethel Park School District as Director of Curriculum and Instruction on January 19, 1976 at a salary of $28,500.
2. After two years of continuous employment, Appellant has received one satisfactory rating, while receiving no unsatisfactory rating.
3. A professional contract was not given to the Appellant after he had completed his second year of service.
4. The following duties were performed by Dr. Moon in his capacity as Director of Curriculum and Instruction.
    a. Appellant was responsible for Curriculum Instruction, K-12.
    b. Appellant was responsible for rating professional employees (i.e., subject area coordinators and secondary principals).

c. Appellant developed in-service training programs in the elementary, middle and secondary schools with regard to curriculum instruction. Appellant implemented, staffed, and devised the content of these programs.

d. Appellant visited every classroom to observe the methodology and level of instruction in the classroom.

e. Appellant supervised the Director of Elementary Education, who reported to the Appellant.

f. Appellant introduced a program for gifted and talented children in the Bethel Park School District. The program was carried out under Appellant's supervision and direction.

g. Appellant performed all of the functions listed on the job description of the school district, entitled "Assistant to the Superintendent for Instruction."

5. On June 19, 1978, the Board of School Directors of Bethel Park School District eliminated the position of Director of Curriculum and Instruction, and Appellant's employment was terminated effective September 1, 1978.

6. Appellant was not provided with notice stating the charges on which his dismissal was based, nor was a hearing provided before the School Board.

7. Appellant filed a Petition of Appeal in the Office of the Secretary of Education on July 18, 1978, stating that "there exists no valid causes for the dismissal of the Appellant."

8. A hearing on this Appeal was held before the Secretary of Education on September 11, 1978.

DISCUSSION

Appellant contends that his position of Director of Curriculum and Instruction falls within the category of "supervisor" enumerated in Section 1101 of the School Code and defined in "Professional Personnel Certification and Staffing Policy and Guidelines," (CSPG) published by the Pennsylvania Department of Education (1975). As a "supervisor," he asserts that he qualifies as a professional employee and is entitled to the protection of the tenure provisions of the School Code, 24 P.S. §11-1127. Appellant bases this claim upon his contention that he acted in the capacity of "Supervisor of Curriculum and Instruction" for the district, as well as being qualified for this position by virtue of his letter of eligibility for superintendent.

The district contends that the position of Director of Curriculum and Instruction, as defined by the job description and as performed by the Appellant, is a non-mandated position not within any category of Section 1101 of the School Code, 24 P.S. §11-1101. The district reaches this conclusion because "director" is not a position enumerated in Section 1101. The district contends that the Appellant is not a professional employee, has no rights under the Tenure Act, and therefore his dismissal was legal and proper. The district further contends that since the Appellant is allegedly not a professional employee, he is not entitled to appeal his dismissal under the provisions of the Teacher Tenure Act, and the Secretary of Education is without jurisdiction to decide this appeal.

We find that the Appellant is a professional employee and is entitled to the protection which the Teacher Tenure Act affords professional employees.

The fact that the Appellant's title, Director of Curriculum and Instruction, is not specifically mandated in Section 1101 of the School Code is not determinative of professional employee status. The titles listed in Section 1101 for professional employee status are not exclusive of all others. Charleroi Area School District v. Commonwealth of Pennsylvania, Secretary of Education, 18 Pa. Commw. Ct. 121, 334 A.2d 785 (1975). To determine professional employee status, Charleroi requires an analysis of the professional titles prescribed by the Department of Education:

Section 1101 of the School Code, 24 P.S. §11-1101(1) provides:

> "The term 'professional employe' shall include those who are certified as teachers, supervisors, supervising principals, principals, assistant principals, vice-principals, directors of vocational education, dental hygienists, visiting teachers, home and school visitors, school counselors, child nutrition program specialists, school librarians, school secretaries the selection of whom is on the basis of merit as determined by eligibility lists and school nurses."
>
> Section 2(h) of the Act of August 13, 1963, P.L. 689, 24 P.S. §1225(h) (Supp. 1974-75), amending the Act of May 29, 1931, P.L. 210, authorizes the Department of Education to prescribe the professional titles used in the public school system. The regulations of the State Board of Education provide that the Department of Education has the responsibility for "designation of professional titles for personnel." 22 Pa. Code §49.13(b)(2).

Pursuant to this authority, the Department has designated three professional titles that would fall within the category of supervisor: 1) supervisor of a specific instructional or educational area, 2) supervisor of curriculum and instruction, kindergarten through twelfth grade, and 3) supervisor of pupil personnel services, kindergarten through twelfth grade.

Pursuant to its authority under sections 1201, 1202 and 1203 of the School Code, 24 P.S. §§12-1201, 12-1202 and 12-1203, as amended, and the Act of August 13, 1963, P.L. 689, 24 P.S. §1225(b)(c)(h), amending the Act of May 29, 1931, P.L. 210, the Department prescribes the certificates which qualify the individual to use the supervisory titles described above.

The department issues several different supervisory certificates that qualify the holders for either vertical or horizontal (district-wide) supervision. To be qualified for vertical supervision, the individual holds a supervisory certificate in a particular field that qualifies him or her to supervise only the specific instructional or educational area in that field. A letter of eligibility for superintendent or assistant superintendent, an administrative certificate as an assistant to the superintendent, or a certificate for supervision of curriculum and instruction qualifies the holder to be a supervisor of curriculum and instruction (K-12). All these certificates qualify the holder for horizontal supervision across instructional or educational service areas.

Appellant holds a valid letter of eligibility for superintendent. Thus, he is qualified to use the professional title of "supervisor of curriculum and instruction." The supervisor in this position is considered to be a district-wide specialist in curriculum and instruction.

The next relevant inquiry is whether or not he is functioning in that capacity. CSPG No. 41 sets forth the scope of authorized functions under the job title of supervisor of curriculum and instruction:

> The position of supervisor of curriculum and instruction is that assignment in which the incumbent employee is considered a districtwide specialist in curriculum and instruction and is engaged in, responsible for, or performing duties such as:
>
> ...Coordination or conduct of instructional supervision
> ...Design and development of curriculum, learning materials and innovative educational processes and conduct of experimental programs.
> ...Direction or conduct of basic or applied educational research.

The duties performed by Appellant, which are set forth in Finding of Fact No. 4, fall squarely within the defined functions. This conclusion is further strengthened by a letter sent to the Appellant from the district's superintendent informing the Appellant of his appointment, in which it was stated that "...you will be eligible for all of the benefits provided by the District for its administrative and supervisory employees." (Emphasis supplied.)

An individual who is qualified to be a professional employee and is functioning as a professional employee is a professional employee. Assigning that individual a local job title, "director," rather than "supervisor," does not relieve the board of its duties to a professional employee under the School Code. A rose by any other name would smell as sweet. A "supervisor" by any other name is entitled to the same rights.

Likewise, it must be noted that the Appellant was employed by the district for a period in excess of two years, receiving a satisfactory rating after his first year, and receiving no rating after his second year. Pursuant to Section 1108 of the School Code, 24 P.S. §11-1108, Appellant argues that he was entitled to a regular contract of employment after his two years of service. Elias v. Board of School Directors, 421 Pa. 260, 218 A.2d 738 (1966); Young v. Littlestown Area School District 24 Pa. Commw. Ct. 621, 358 A.2d 120 (1976). Assuming that Appellant was a professional employee prior to holding this position, he was entitled to the contract in January, 1976. One does not need to reacquire tenure in each category of Section 1101.

Having established the Appellant's professional employee status, the district's action in dismissing the Appellant must be reviewed. The position of Director of Curriculum and Instruction was eliminated by the Board of School Directors, and the Appellant's employment was subsequently terminated. Appellant was not provided with notice of the reasons for his dismissal, nor was a hearing provided for before the School Board. These actions were in violation of Section 1127 of the School Code, 24 P.S. §11-1127, which provides that professional employees are entitled to both the aforementioned notice and hearing.

> Before any professional employee having attained a status of permanent tenure is dismissed by the board of school directors, such board of school directors shall furnish such professional employee with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing.

We therefore find that Appellant should have been provided with notice and a hearing prior to his dismissal.

The reason for the Appellant's dismissal, the elimination of the position of Director of Curriculum and Instruction by the School Board, is not proper for the termination of the Appellant's employment. In Charleroi Area School District v. Commonwealth of Education, Secretary of Education, 18 Pa. Commw. Ct. 121, 334 A.2d 785 (1975), the district terminated the position of school psychologist, and the psychologist was dismissed. The court held that the employment of a professional employee may not be terminated simply because the position he or she occupied was abolished.

> The law is clear that if proper procedures are followed, positions occupied by professional employees may be abolished. See Smith v. Darby School District, 388 Pa. 301, 130 A.2d 661 (1957). Nevertheless, "terminating" the position does not of itself terminate the professional employee's appointment. The minimum to which she is entitled is suspension and after the relevant facts have been determined, she may have rights that would entitle her to be retained in another capacity.

Id. at 787.

We find that the Bethel Park School District likewise may not terminate Appellant's employment simply by abolishing the position in which he was employed. Therefore, we find the district's action also to be in violation of Section 1122 of the School Code, 24 P.S. §11-1122, which states the only valid causes for dismissal of a professional employee.

> The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocation of or participating in un-American or subversive doctrines, persistent and willful violation of the school laws of this Commonwealth on the part of the professional employee....

There is no provision for the termination of employment which is predicated upon the elimination of a position within the district which is occupied by a professional employee.

Accordingly, we make the following:

ORDER

AND NOW, this 6th day of November, 1980, it is hereby ordered and decreed that the appeal of Howard H. Moon be and hereby is sustained and that the board of school directors of the Bethel Park School District reinstate him without loss of pay.

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

JOSEPH ALLEN RAYMOND, :
Appellant :
:
v. : Teacher Tenure Appeal
: No. 38-78
WESTERN WAYNE SCHOOL DISTRICT, :
Appellee :

OPINION

Joseph Allen Raymond, Appellant herein, has appealed from a decision of the Western Wayne School District dismissing him as a professional employee on the grounds of immorality.

FINDINGS OF FACT

1. Appellant, Joseph Allen Raymond, was first employed as a temporary professional employee for the Western Wayne School District in September of 1975.

2. Appellant completed two years of satisfactory service in the school district in June of 1977 thereby attaining the status of professional employee.

3. On the night of September 25, 1978, Appellant alleges he parked his truck to take an evening walk. (N.T. November 30, 57-74). Appellant further alleges while walking he believed he was being chased by a bear and attempted to seek aid at a trailer home. He testified that when the occupants of the trailer detected his presence at their bedroom window Appellant fled. (N.T. November 30, 67-69.)

4. On September 26, 1978, Appellant went to the principal's office to inform him of the events of the previous evening; Appellant

expressed concern that formal charges would be brought against him. (N.T. November 30, p. 75-78).

5. On September 26, 1978, Appellant was arrested and charged with a violation of the Criminal Statutes for looking in the window of a trailer occupied by other parties late at night.

6. Appellant and Appellee concur that the Superintendent of Schools decided to await the outcome of the criminal proceedings before determining whether or not to take disciplinary action against the Appellant.

7. On October 17, 1978, at a hearing before the district magistrate, the criminal charges against the Appellant were dropped. A representative of the Superintendent attended that hearing.

8. On October 18, 1978, Appellant was suspended without pay, pending a dismissal hearing for charges of immorality.

9. On November 16, 1978, Appellant received a certified letter from the Superintendent charging him with immorality, specifically with voyeurism, and notifying the Appellant of the date of his dismissal hearing.

10. On November 30, 1978 Appellant had a dismissal hearing before the Board of School Directors of the Western Wayne School District.

11. On December 4, 1978, at a Board of School Director's meeting, the Board voted to dismiss Appellant on the grounds of immorality.

12. On December 5, 1978, the Board of School Directors notified Appellant that he had been dismissed for immorality; termination was effective October 15, 1978.

13. On December 19, 1978, the Secretary of Education received a Petition for Appeal on behalf of the Appellant.

14. On February 26, 1979, a hearing was held before a hearing examiner representing the Department of Education.

DISCUSSION

Having reviewed the decision of the Board and a record of the hearing before the Board, and having heard argument on behalf of the Appellant and the school district, it is our conclusion that the charges against the Appellant are supported by substantial evidence. We uphold the decision of the Board dismissing Joseph Allen Raymond for immorality.

Appellant first offers the argument that the Superintendent's decision to await the outcome of the criminal proceeding was an assurance that if the criminal charges were dropped, no further action would be taken by the School District. The Secretary of Education finds that the Superintendent's decision to await the outcome of the criminal proceedings before deciding whether or not to take disciplinary action against Mr. Raymond did not ensure that a dismissal action would not ensue if the criminal charges against him were dropped.

A criminal conviction need not occur to constitute a finding of immorality within the meaning of Section 1122 of the School Code, 24 P.S. §11-1122 nor does the fact that a criminal charge was made and subsequently dropped preclude such a determination. The standards for evidence of culpability and the burden of proof in criminal proceedings are different than the standards used in civil and/or administrative proceedings. The fact that the criminal charges against Mr. Raymond may have been dropped due to lack of sufficient evidence does not affect the finding by the Board, in its administrative hearing, that substantial evidence existed for dismissal of a professional employee on grounds of immorality.

It was within the purview of the Superintendent to send a representative of the school district to the Magistrate's hearing in order to gain information necessary to determine if there was substantial evidence pertaining to this incident to sustain a petition for dismissal of Mr. Raymond on the grounds of immorality. The fact that the Magistrate dismissed the criminal action did not preclude the Superintendent from suspending Mr. Raymond pending a dismissal hearing on a charge of immorality.

The major issue raised by the appellant in this action concerns whether or not the single incident which occurred on September 25, 1978 constituted immorality so as to justify a dismissal under Section 1122 of the School Code. In Horosko v. Mt. Pleasant Township School District, 335 Pa. 369, 372, 6 A.2d 866, 868 cert. denied, 308 U.S. 553 (1939), the court defined immorality as:

> "...a course of conduct that offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate."

The courts have held that a single incident of sufficient severity supports the dismissal of a professional employee. Landi v. West Chester Area School District, 23 Pa.Commw.Ct. 586, 353 A.2d 895 (1976). The fact that the incident and behavior in question occurred outside the classroom does not preclude the Board from dismissing Appellant if the Board determines that such conduct constituted immorality. No nexus between the professional employee's immoral behavior and his ability to teach need be established once a determination of immorality is reached:

> [s]uch a finding is all that is necessary to deprive a teacher of the privilege of teaching children on the grounds that his conduct offended the moral standards of the community and set a bad example to the youth under his charge.

Penn-Delco School District v. Urso, 33 Pa.Commw.Ct. 501, ____, 382 A.2d 162, 168 (1978). The courts have further stated that a finding of a school board that a professional employee is guilty of offending moral standards of the community will not be disturbed on appeal when supported by substantial evidence. Baker v. School District of the City of Allentown, 29 Pa.Commw.Ct. 453, 371 A.2d 1028 (1977).

Appellant contends that the evidence introduced at the hearing was not substantial and that the decision to dismiss him should be overturned. The standard used to determine if evidence is sufficient is the substantial evidence rule cited by the court in Landi v. West Chester Area School District, 23 Pa.Commw.Ct. 586, ___, 353 A.2d 895, 897 (1976). This rule:

> ...should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and should be set aside. (Citations omitted) (Emphasis in original).

Our careful review of the record, convinces us that a reasonable man acting reasonably might have reached the decision made by the Board of School Directors. The evidence, which consisted of the testimony of the two occupants in the trailer and the testimony of the Appellant, was basically undisputed as to the facts involved in this incident. What is in dispute is the purpose or intent of the Appellant as he stood on the cinderblock and looked in the bedroom window of the trailer. In determining which version to accept in a situation where the witness's testimony is in conflict with the professional employee's testimony, the court has held:

> that there is sufficient evidence to justify a school board's decision to dismiss a professional employee where the record shows the board chose to accept the student's version...rather than the teacher's version.

Wissahickon School District v. McKown, 42 Pa.Commw.Ct. 169, 400 A.2d 899, 901 (1979). The court in the McKown decision quotes Penn-Delco v. Urso, 33 Pa.Commw.Ct. 501, 511, 382 A.2d 162, 167 (1978) stating that:

> the board as the factfinder with respect to these two incidents, and the only tribunal having the opportunity to hear first-hand the testimony of both students and Respondent, resolved the issue of credibility against the Respondent.

The Appellant in this case was dismissed for immorality after a hearing in which his conduct on the night in question was described by himself and two witnesses. The Secretary recognizes that the case law is not clear as to whether the Secretary must sustain a dismissal for immorality if it is supported by substantial evidence based on the Board's judgment of the credibility of witnesses. In McKown, the court held that that the Secretary of Education cannot review the Board of School Director's determination of the credibility of the witnesses:

> We agree with the Secretary that a careful review of all the testimony...could raise questions about (a witness's) credibility, even in the Secretary's words, rising to the level of "reasonable doubt." We do not believe, however, that it was within the Secretary's power to substitute her judgment regarding the credibility of this witness for that of the Board.

McKown, supra, at 900.

Yet, in Grant v. Board of School Directors of the Centennial School District, 43 Pa.Commw.Ct. 556, 403 A.2d 157, 159 (1979) the court stated that:

> The provision in sum establishes the Secretary of Education as the ultimate factfinder in cases of this nature and with this status goes the power to determine the credibility of witnesses, the weight of their testimony and the inferences to be drawn therefrom.

Hence, it is not clear whether the Secretary on appeal must sustain a dismissal if supported by substantial evidence relying on the Board's judgment of the credibility of witnesses (Penn-Delco), or become the ultimate fact finder and judge of credibility, (Grant). However, using either standard of review, we hold that the determination of the Board of School Directors in the instant case must stand.

The instant case is controlled by the reasoning articulated in Penn-Delco and McKown. Although there were no formal findings of fact by the Board, the directors did vote that the charges and complaints against Mr. Raymond were sustained and the testimony substantiated them. Under the McKown standard of review it was within the discretion of the Board to listen to the testimony and determine if the Appellant, while allegedly fleeing from a bear, stood on a cinderblock and peered in a bedroom window in an attempt to get assistance and protect himself, or if he was committing an immoral act by using a cinderblock to gain elevation to look in the bedroom window of a trailer in order to observe the occupants engaged in intimate relations.

Under the Penn-Delco scope of review it is also within the discretion of the Board to decide what weight, if any, to grant the testimony of the five witnesses the Appellant called on his behalf. The testimony of these witnesses was similar in nature; each person spoke of the Appellant's good moral character. In McKown, supra, where fellow teachers testified that the preparation room in which that appellant allegedly engaged in immoral acts with a student was frequently used by many persons, thus making it difficult to consider the room private enough for the alleged acts, the court found that this testimony "only established that the room was used daily, but not that it was used at the time the alleged act occurred." McKown supra, at 901. Similarly, it was within this Board's discretion to decide that the character testimony offered on behalf of the Appellant merely proved that the five witnesses had never heard anything immoral or disreputable about Mr. Raymond, rather than to find this testimony proved him to be innocent of the specific conduct with which he was charged.

It is apparent in view of the entire record that the Board chose to believe Scott and Terry Leet, who testified as to Mr. Raymond's immoral conduct, rather than Mr. Raymond's testimony, or that of his five character witnesses. The Leet's testimony, coupled with Mr. Raymond's inability to offer a credible explanation for why he was standing on a cinderblock outside the Leets' bedroom window, constituted substantial evidence.

Even if the standard of review articulated by the Commonwealth Court in Grant, supra, is to be used, in light of a review of the entire transcript of the proceedings, the Secretary of Education must agree with the Board that the testimony of the Leets is more credible than Mr. Raymond's explanation. His assertion that he picked up a cinderblock and walked back around the trailer in order to stand on the block and ask assistance from the occupants inside to defend himself from a bear chasing him is difficult to believe. Given the two eyewitness accounts of Mr. Raymond's conduct from persons with no apparent reason to fabricate, the weight of credible testimony supports Mr. Raymond's dismissal for immorality.

Accordingly, we make the following:

ORDER

AND NOW, this 30th day of September,1980 it is hereby ordered and decreed that the appeal of Joseph Allen Raymond of the Western Wayne School District, Wayne County, Pennsylvania is hereby dismissed.

Robt G. Scanlon

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

BARBARA C. BECK, :
Appellant :
: Teacher Tenure Appeal
v. : No. 39-78
:
YORK CITY SCHOOL DISTRICT, :
Appellee :

OPINION

Barbara C. Beck, Appellant herein, has appealed the November 1, 1978 action of the York City School District dismissing her as a professional employee. For reasons stated below the above-referenced appeal is dismissed.

FINDINGS OF FACTS

1. Barbara C. Beck, Appellant herein, is a professional employee who was employed by the York City School District at the time of the actions herein contested. (Appellant's Petition, Paragraph #2, hereinafter referred to as A.P. #)
2. On November 1, 1978 the York City School District voted to dismiss Appellant. (A.P. #17)
3. On December 2, 1978 the petitioner received notice of the decision of the school district by certified mail. (A.P. #19)
4. On December 29, 1978, on appeal was filed with the Office of the Secretary of Education pursuant to Section 1131 of the Public School Code, 24 P.S. §11-1131.
5. By letter dated January 11, 1979, the Appellant's counsel, Thomas W. Scott, requested a continuance of a hearing scheduled before the Secretary of Education in Appellant's appeal pending resolution of a

grievance process which had been instituted by Appellant regarding the same facts at issue in this appeal.

6. The School District of the City of York requested that the continuance not be granted.

7. The Secretary of Education granted the continuance requested by Appellant noting that action would not be taken by the Secretary pending the action taken before the PLRB.

8. Having had no contact from the attorney for either party, Linda J. Wells, Counsel for the Secretary of Education, contacted Thomas Scott on January 2, 1980 regarding the appeal in question.

9. In response to the conversation noted in Finding of Fact No. 8 above, Mr. Scott, by letter dated March 18, 1980, wrote to the Pennsylvania Labor Relations Board requesting an expeditious decision in the case pending before them in this matter.

10. On October 21, 1980, Pennsylvania Labor Relations Board issued a final order in the matter of PLRB v. School District of the City of York (Barbara Beck), case No. PERA-C-12, 239-C.

11. Following the final order referenced above, the Secretary of Education has had no contact from either party regarding the appeal in question.

DISCUSSION

Section 1131 of the Public School Code gives the Secretary of Eduction jurisdiction over appeals by professional employees considering themselves aggrieved by action of the local school district board of directors. In the instant case, as indicated by the Findings of Fact, Appellant herein chose to simultaneously pursue a grievance procedure as well as an appeal to the Secretary of Education. At the request of

Appellant, the Secretary of Education granted a continuance pending the outcome of the action filed before the Public Employees Relation Board.

The decision of the Public Employees Relations Board was reached on October 21, 1980. Since that time (one year and two months) no action has been taken by either party to this appeal to pursue the matter filed herein with the Secretary of Education. The inaction of Appellant is sufficient cause to dismiss her appeal before the Secretary.

Accordingly, we make the following:

ORDER

AND NOW, this 5th day of February, 1982, it is Ordered and Decreed that the appeal of Barbara C. Beck be dismissed.

Robert G. Scanlon
Secretary of Education
Commonwealth of Pennsylvania

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

DAVID M. BENDL, : Teacher Tenure Appeal
Appellant :
:
v. : No. 1-79
:
BOARD OF SCHOOL DIRECTORS :
OF THE GREATER LATROBE :
SCHOOL DISTRICT, :
Appellee :

OPINION

David M. Bendl, Appellant herein, has appealed from the decision of the Greater Latrobe School District dismissing him as a professional employee on the ground of immorality.

FINDINGS OF FACT

1. The Appellant, David M. Bendl, is a professional employee. As of the 1977-78 school year, he had been employed by the Greater Latrobe School District for a period of five years. He is single and twenty-seven years old.

2. During the 1977-78 school year Appellant was employed as a seventh grade social studies teacher at the Greater Latrobe Area School District Middle School which houses the sixth and seventh grades, with students who are generally twelve and thirteen years old.

3. During the 1977-78 school year, Felicia C. was a seventh grade student at the Middle School. She was twelve years old during most of the school year, becoming thirteen on April 10, 1978. Although Felicia had classes in the Middle School building in which Appellant taught, she was not a student in any of his classes.

4. In late October 1977, Felicia C. was assigned to a detention room for one hour a day for three consecutive days. Appellant was the assigned teacher in charge of the detention room.

5. During the period of detention, conversation occurred between the Appellant and Felicia C. The Appellant asked Felicia to join the color guard, an activity for which he was the faculty sponsor. The Appellant later informed the School Administration that he believed Felicia was an attractive girl and that, "I caught her eye and she caught mine" at the time of the detention. There was, however, no "catching of eyes" as far as Felicia was concerned.

6. On two occasions, one during the conversation regarding the color guard and the other immediately following one of the detention periods, the Appellant asked Felicia to call him. He told the Administration, "I knew she liked me and I did ask her to call me."

7. In November 1977, approximately two weeks after the detention periods, at the end of a school day Felicia C. got off of the school bus at the bus stop near her home. In the driveway of her house she saw an unfamiliar automobile which pulled out of the driveway, drove down to where she was walking, and stopped next to her. Felicia recognized the driver to be the Appellant, whom she had never seen in the area before. The Appellant engaged her in brief conversation and asked her where she lived. The conversation lasted about three minutes and ended when Felicia's younger brother approached the car. The Appellant said goodbye, drove off, and Felicia ran into her house to tell her mother what had happened.

8. At the time of this incident the Appellant lived in town four blocks from the Middle School. Felicia's home was in a town approximately

five miles from the Middle School. There was no purpose connected with the Appellant's professional teaching duties which required him to be in Felicia's driveway or at her bus stop, nor had he ever before talked at a bus stop with other children in Felicia's general age group.

9. On November 21, 1977, Stephen Bair, a guidance counselor at the Middle School, received a complaint from Felicia's parents regarding the driveway and bus stop incident. He reported the matter to C. Richard Nichols who was then principal at the Middle School.

10. On November 23, 1977, a meeting was held between Mr. Nichols and the Appellant. The Appellant was made aware that Felicia's parents were upset over the incident. Mr. Nichols instructed the Appellant not to drive to Felicia's home, never to bother her or speak to her again, and that should a similiar incident reoccur he would refer the matter to the Board of School Directors. The Appellant offered no explanation for going to Felicia's home other than that he had wanted to speak to her. He agreed not to talk to Felicia, not to go near her home, and to stay away from her.

11. Despite his agreement and understanding with the School Administration, the Appellant initiated and carried on more than a dozen conversations with Felicia beginning in March 1978. The conversations became regular, occurring near the Appellant's assigned classroom or in the stairwell adjacent to his room and generally when no one else was nearby. The Appellant usually entered the stairwell after Felicia was already there. Felicia did not initiate or encourage the Appellant to initiate these conversations.

12. During one of the conversations the Appellant said to Felicia: "Do you know if I get caught talking to you I'd lose my job?"

13. In late March 1978, the Appellant followed Felicia up the steps in the stairwell and spoke with her privately, remarking that she was the sexiest girl in the school.

14. The Appellant's recollection of the conversation is that he said, "I think you're the sexiest girl I have ever met."

15. Felicia's recollection of this conversation was that the Appellant told her she was "the prettiest and sexiest girl in the school, and someday it might get to be more than that" and that "he had hoped that it would be more than that."

16. The recollection of Thomas Kissell, Superintendent of Schools, and of Mr. Ernest Covert, Principal of the Middle School, is that the Appellant stated to them in a meeting of April 7, 1978, that he said to Felicia "I want you to know that you're the sexiest girl I ever met. I mean this as a compliment now, and I hope that someday we could be more than just friends." "I knew the girl liked me. I wanted her to know that I liked her, and sometime down the way, five years from now, maybe something would work out. These are the kinds of things that I'd like to talk to her about, not necessarily sex at this time, but perhaps in the future."

17. Sometime between the end of March and April 3, 1978, the Appellant again followed Felicia into the stairwell and engaged her in another private conversation. He told her, "I love you and I do not know what to do about it." At the April 7, 1978 meeting with Mr. Kissell and Mr. Covert the Appellant admitted making the remarks to Felicia.

18. The Appellant's remarks to Felicia throughout late March and early April 1978 were made seriously rather than in a joking or kidding manner. Felicia recalls that he spoke slowly and that he looked and acted seriously when he spoke to her.

19. As a result of the Appellant's remarks to her, Felicia became scared. She felt the Appellant's behavior was "weird" and a strange way for a teacher to behave. She went home and told her mother.

20. Shortly thereafter Felicia had a dream or nightmare in which she was being chased by the Appellant. She was extremely upset and afraid to go to school because she did not know what the Appellant was going to do.

21. On April 4, 1978, a student in one of the Appellant's classes asked him if it was true that he liked Felicia C. The Appellant took the student into the hallway and interrogated him about the origin of the taunt. When the student informed him that two girls had told him that the Appellant liked Felicia, the Appellant talked to the girls and told them that he considered Felicia just a friend. On April 5, 1978, the Appellant was again taunted by one of his students about liking or loving Felicia.

22. On April 6, 1978, because she was upset about the Appellant's behavior and at her mother's insistence, Felicia was absent from school. The Appellant was sufficiently upset about Felicia's one day absence that he purchased a newspaper to see if she was in the hospital.

23. On April 6, 1978, the parents of Felicia C. called Stephen Bair, the school counselor. The parents registered strong complaints about the Appellant's conduct during the prior week, including his profession of love to their daughter. They demanded a meeting with the Superintendent in light of the events of the prior fall, the complaint they had lodged with the school personnel, and the warning which had been given the Appellant. The Superintendent held a conference with the parents the next day, April 7, 1978.

24. On April 7, 1978, Superintendent Kissell and Principal Covert also met with the Appellant. At that meeting he admitted making many of

the remarks to Felicia C. which had been attributed to him. (See Findings of Fact Nos. 6, 13, 14) Regarding his agreement with the School Administration the prior fall, the Appellant said, ". . .I was not supposed to talk to her, but although I was not supposed to, I wanted to talk to her."

25. On April 10, 1978, the Appellant again met with the Superintendent. Appellant gave Mr. Kissell a handwritten evaluation or character analysis in which he described himself as a quiet individual, somewhat withdrawn, insecure, not self-confident, lonely at times, and unsatisfied with self to the point of depression. He described how this affected him at school as "unsatisfied with lessons" and "not sure of my abilities." The Appellant stated that he "sought special relationship with Felicia." On a second sheet, the Appellant wrote serious questions with which he was groping:

> "What have I done to Felicia?"
>
> "What have I done to my family?"
>
> "What have I done to this school?"
>
> "Have I ruined my life?"
>
> "Will anyone believe that I was not after sex?"

26. On April 20, 1978, the Board of School Directors of the Greater Latrobe School District sent a Statement of Charges and Notice of Hearing to the Appellant.

27. A dismissal hearing was conducted by the Board on May 17, June 12, August 28, and August 29, 1978. On January 24, 1979, both sides were given an opportunity to submit findings of fact and to offer oral argument to the Board.

28. On January 31, 1979, the Board voted unanimously to dismiss the Appellant on the ground of immorality. The Appellant received written notice of the dismissal on February 2, 1979.

29. On February 6, 1979, the Appellant filed an Appeal from his dismissal with the Secretary of Education.

30. A hearing on the Appeal was held on March 21, 1979.

DISCUSSION

The Appellant's contract was terminated on grounds of immorality as set forth in Section 1122 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1122. Having reviewed the entire record, we conclude that the charge is supported by substantial evidence and that the procedural requirements of the School Code for the dismissal of a professional employee have been satisfied. Accordingly, we must dismiss the Appeal and uphold the School Board's action dismissing the Appellant.

Immorality, as the term is used in Section 1122 of the School Code, was judicially defined by the Supreme Court of Pennsylvania as "a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate." Horosko v. Mount Pleasant Township School District, 335 Pa. 369, 372, 6 A.2d 866, 868 (1939). See also Appeal of Flannery, 406 Pa. 515, 178 A.2d 751 (1962). The Court in Horosko stated that to be considered immoral conduct need not pertain exclusively to sexual misconduct but may constitute social misconduct of almost any nature. The teacher dismissed in Horosko was married to the proprietor of a restaurant in which beer was sold and a pinball and slot machine were maintained. The teacher tended bar and gambled with customers in the presence of school children who were pupils she tutored. Her dismissal for immorality was upheld by the Supreme Court of Pennsylvania.

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A comprehensive discussion of immorality under the School Code is provided in Penn-Delco School District v. Thomas Urso, 33 Pa. Commw. Ct. 501, 382 A.2d 162 (1978). In that decision, despite warnings by school administrators a teacher had conversations with two female students during which he offered to spank the students. The students believed that the offer had sexual connotations and, although the teacher denied any sexual overtones, the teacher was dismissed by the Board on the ground of immorality. The Commonwealth Court, upholding the Board's decision, reiterated the definition of immorality in the Horosko decision and went on to state that:

> Discussion of sexual subjects is a matter of particular sensitivity in society in general and when such discussion becomes a part of a course of conduct by an individual such conduct may be perceived by others as either amoral or immoral. When such matters are discussed with school age children, society, and particularly the parents of such children, become more acutely concerned both because such discussions can cause psychological harm and because children may view such conduct as a desirable example to follow. Where teachers (italics) engage in such discussions with children the problem is exacerbated because of the significant influence teachers exert over the intellectual, moral, and psychological development of children. Where a teacher engages in such discussions outside the context of a classroom or a pedagogical setting, a school board, viewing these actions against the moral standards of the community, might will conclude that such conduct exceeds the bounds of propriety and fails to give students the proper guidance as to morals and standards of conduct which teachers should foster and encourage in their students. Such a finding is all that is necessary to deprive a teacher of the privilege of teaching children on the grounds that his conduct offended the moral standards of the community and set a bad example to the youth under his charge. Urso, supra at 167, 168.

Over the years many circumstances have been judicially determined to constitute immorality under the School Code. See cases such as Batrus' Appeal, 148 Pa. Super. Ct. 587, 26 A.2d 121 (1942) (a teacher made false statements on a malt liquor license application to the Liquor Control Board); Flannery Appeal, 406 Pa. 515, 178 A.2d 751 (1962) (a teacher misappropriated school funds which he administered); Baker v. School District of Allentown, 29 Pa. Commw. Ct. 453, 371 A.2d 1028 (1977) (a teacher entered a plea of nolo contendere to a federal gambling charge); Bovino v. Indiana Area School District, 32 Pa. Commw. Ct. 105, 377 A.2d 1284 (1977) (a teacher called a student a slut and a prostitute). Recently the Secretary of Education has upheld dismissals on grounds of immorality in Appeal of Gianciacomo, Teacher Tenure Appeal No. 304 (1977) (a teacher employed and then assaulted minors at his bar) and Appeal of Cann Teacher Tenure Appeal No. 24-77 (1977) (an industrial arts teacher used profanity to some of his students).

In light of our discussion of the foregoing cases as well as the standard of review and quantity of evidence discussed below, we find that the Appellant's behavior constitutes immorality under the School Code as judicially defined and interpreted.

The standard of review in cases involving a charge of immorality has been most recently and comprehensively stated by the Commonwealth Court in Penn-Delco v. Urso, supra. In that decision the Court stated:

> A finding of the school board that a professional employee was guilty of offending the moral standards of the community by his actions will not be disturbed on appeal when supported by substantial evidence. Baker v. School District of City of Allentown, 29 Pa. Commw. Ct. 453, 371 A.2d 1028 (1977). Such substantial evidence necessary to justify dismissal is determined by whether a reasonable man acting reasonably might have reached the same decision reached by the Board. Landi v. West Chester Area School District, 23 Pa. Commw. Ct. 586, 353 A.2d 895 (1976), Id. at 167.

It is apparent in view of the entire record that the Board chose to accept the testimony of the School District's witnesses, including Felicia, as to the substance and the meaning of what was said by the Appellant. Appellant disputes the interpretation given some of his statements, however, we note that Appellant does not dispute the substance of many of the statements nor does he dispute the testimony regarding actions attributed to him.

We must affirm the Board's findings "unless constitutional rights were violated, there was an abuse of discretion, an error of law was committed, or a necessary finding of fact is unsupported by substantial evidence." Steffen v. Board of Directors of South Middletown Township School District, 32 Pa. Commw. Ct. 187, 377 A.2d 1381 (1977); see also English v. North East Board of Education, 22 Pa. Commw. Ct. 240, 348 A.2d 494 (1975). We find no such violation of rights or error of law here. Nor can we say the Board lacked sufficient evidence to reach its conclusion or that a reasonable man acting reasonably could not have reached the same decision as the School Board.

The evidence shows that the Appellant, a single, twenty-seven year old teacher, developed an unusual infatuation with a twelve year old female student which extended over a period of many months. The Appellant asked the student to call him, drove to her house for no legitimate school-related purpose, and sought her out during the school day for conversations in a semi-private stairwell near his classroom. He initiated and conducted these conversations despite an earlier warning from the School Administration, his awareness of the parents' concern, and his understanding of the possible consequences of his persistence. The final incidents which precipitated the charges involved the Appellant's statements to the student that he found her sexy and that he loved her and did not know what to do about it. The record reveals that these remarks left the student confused and upset by what she perceived as strange behavior for a teacher. The record discloses no substantial dispute as to the comments made by the Appellant to the student except as to the context in which they were made and the interpretation they should be given.

At his hearing, the Appellant stated that he was aware that twelve-year old students are impressionable and likely to look to teachers for guidance and example. He also stated that he had received training and instruction in setting the highest moral example to young students. He testified that the student was infatuated and flirtatious with him--a conclusion which the Board rejected. Appellant stated that under such circumstances his role as a teacher would require extreme restraint. However, rather than exercising such restraint and discouraging the student, informing his superiors, contacting the parents, or taking any other appropriate, constructive professional action, the record indicates that the Appellant, no matter how naive or well-intentioned, took measures which he knew encouraged the situation and provided an unfortunate example to a twelve year old girl "whose ideals a teacher is supposed to foster and elevate." Horosko supra at 372.

In Appeal of Carmichael, Teacher Tenure Appeal No. 174 (1968) we stated:

> The dismissal action taken by the Board will no doubt affect the teacher in securing new employment in his chosen field of endeavor, but they evidently took into consideration its effect on the young students who were subjected to the Appellant's misbehavior, and this was entitled to priority.

It is beyond dispute that the teaching profession imposes certain moral and ethical standards upon those who teach because of the critical influence the teacher exercises over his students. The courts of this Commonwealth have on occasion referred to the high standards and expectations the community imposes on those who teach:

> It has always been the recognized duty of the teacher to conduct himself in such a way as to command the respect and good will of the community, though one result of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations. Educators have always regarded the example set by the teacher as of great importance, particularly in the education of the children in the lower grades. (emphasis added) Horosko, supra at 371.
>
> A teacher exerts considerable influence in molding the social and moral outlook of his student by his own precept, deportment, and example. With respect to such moral formation, the role of the teacher may not be minimized. He is the chief creator of the student's educational environment and the main source of his inspiration. Appeal of Edwards, 57 Luz. L. Reg. 105, 112 (1967) quoted in Appeal of Baker, Teacher Tenure Appeal No. 279 (1976).

We cannot find that the Board acted unreasonably in concluding that the Appellant's words, deportment, and example offended the community and set a bad example to the youth whose ideals his behavior should foster and elevate. Based upon our court's definition of immorality, our standard of review, and the evidence in the record, we conclude that a reasonable man acting reasonably could well have reached the same decision as that reached by the Board in dismissing the Appellant on grounds of immorality.

The Appellant also alleges a violation of Section 1130 of the School Code which provides that a decision of a school board discharging a professional employee shall be rendered in writing to the employee within ten days of the conclusion of the hearing. In this case testimony was concluded on August 29, 1978, but was not transcribed, and therefore unavailable for review, until late October, 1978. On January 24, 1979, the Board convened to hear final oral argument and to receive requested findings of fact and conclusions of law based upon the record. On January 31, 1979, the Board voted to dismiss the Appellant.

There is an indication in the record that the Appellant may have stipulated with the Appellee that Section 1130 of the School Code is not mandatory, and, in addition, that the Appellant waived Section 1130 of the School Code. However, we need not decide whether this occurred to dispose of this issue. We have held that the hearing process is concluded when a decision is voted by the Board. *Appeal of Gobla*, Teacher Tenure Appeal No. 36-78 (1979); *Appeal of Brown*, Teacher Tenure Appeal No. 267 (1976). We do not endorse a delay of five months between the conclusion of actual testimony and the Board's vote. Here, however, there appears to be some justification for part of the delay. Notes of testimony were not transcribed until two months after the conclusion of the testimony. Thereafter, time was required for each side to review the record thoroughly in order to prepare comprehensive briefs, including proposed findings of fact, and to prepare final argument to the Board. The Board voted its decision, thereby concluding the hearing process, on January 31, 1979 and notice was sent to the Appellant on February 2, 1979. It is clear that the Board, therefore, complied with Section 1130. Even were this not the case, we have held that the provision requiring that notice be sent within ten days is directory and that failure to do so does not compel the reinstatement of a professional employee. *Appeal of Gobla*, supra.; *Appeal of Mitchell*, Teacher Tenure Appeal No. 28-77 (1977).

Accordingly, we make the following:

ORDER

AND NOW, this 25 day of July 1979, it is hereby Ordered and Decreed that the decision of the Board of School Directors of the Greater Latrobe School District dismissing David M. Bendl be and is hereby sustained.

Robert G. Scanlon

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

DOUGLAS A. BEHN, :
Appellant :
:
v. : Teacher Tenure Appeal
: No. 2-79
BOARD OF SCHOOL DIRECTORS, :
Bethel Park School District, :
Appellee :

OPINION

Douglas A. Behn, Appellant herein, appeals from the action of the Board of School Directors of the Bethel Park School District, dismissing him as a professional employee on the grounds of persistent negligence and persistent and willful violation of the school laws.

FINDINGS OF FACT

1. Appellant is a professional employee under Section 1101(1) the Public School Code, Act of March 10, 1949, P.L. 30, as amended (24 P.S. §11-1101(1)) (hereinafter the School Code). He entered into a professional employee contract with the Bethel Park School District on June 28, 1971. He taught continuously in that school district since the opening of the 1969-70 school term, first as a temporary professional employee and, beginning with the 1971-72 school year, as a professional employee. He taught initially at the Bethel Park Senior High School and later at the Park Avenue School (ninth grade) beginning with the 1975-76 school year and continuing until the date of his dismissal.

2. By a letter dated January 8, 1979, from Frank R. LaValle, Board secretary and director of business affairs of the Bethel Park School District, Appellant was notified that he was charged with persistent negligence and persistent and willful violation of the school laws for nine unauthorized and unexcused absences; failure to prepare and use proper lesson plans; and repeated attempts to excuse unauthorized and unreported absences with uncorroborated and false information. By that letter, Appellant was informed that the Board had scheduled a hearing on the dismissal charges for January 18, 1979.

3. At the time, date and place specified in the notice of hearing, five members of the nine member Board of the Bethel Park School District heard testimony given before an attorney who was appointed hearing examiner. At the hearing, another attorney represented the school district and Appellant was represented by his own counsel.

4. On February 5, 1979, at a special meeting of the Board, upon a roll call vote of the seven members present, the following resolution was unanimously adopted:

> That based upon the evidence presented at the formal hearing on January 18, 1979, it has been determined that Douglas A. Behn is guilty of persistent negligence and persistent and willful violation of the school laws of the Commonwealth of Pennsylvania, and is therefore dismissed from his position as a professional employee for the Bethel Park School District pursuant to Section 1122 of the Public School Code of 1949, as amended.

The seven members of the Board voting in favor of the resolution included four members of the Board who were present at the hearing on January 18, 1979.

5. By a letter dated February 7, 1979, the superintendent of the Bethel Park School District informed Appellant of his dismissal.

6. On February 27, 1979, Appellant filed a Petition of Appeal with the Secretary of Education.

7. The Secretary of Education scheduled a hearing for April 23, 1979, which, by agreement of the parties, was continued until April 26, 1979. On that date, counsel for Appellant informed an employee of the legal division of the Department of Education that Appellant wished to waive his hearing. Appellant had authorized his counsel to waive Appellant's right to a hearing. Counsel for Appellant further informed the employee that counsel for the Appellee also wished its argument to be submitted on briefs.

8. The record submitted contains the following facts: Appellant failed to report for his duties as a classroom teacher and further failed to follow the reporting procedures on the following dates:

a. On May 12, 1971, Appellant telephoned the school school at 9:40 A.M. to say that he had overslept and would not be reporting for duty that day; (E. 5, N.T. 26)*

b. On January 21, 1972, Appellant telephoned the school at 9:15 A.M. to say that he would not be reporting for duty that day; (E. 6 and 7, N.T. 27)

c. On February 13, 1975, Appellant failed to report for duty and the administration did not become aware of his absence until 11:00 A.M.; his stated reason for this absence was oversleeping; (E. 8, 9, N.T. 46, 47)

d. On June 13, 1975, Appellant reported for duty late at 10:05 A.M.; (E. 10, 11, N.T. 47, 48)

e. On October 9, 1975, Appellant telephoned the school at 8:50 A.M. to say that he was not reporting for duty that day; (E. 12, 13, N.T. 31, 32)

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*"E." indicates exhibit; "N.T." indicates Notes of Testimony)

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f. On October 27, 1975, Appellant failed to report that he would be absent from duty that day. He later explained that his absence was due to illness. He subsequently promised to obtain a physician's statement which he never produced. The Teacher's Procedures Manual does not require a physician's statement until after three consecutive days of absence. (E. 14, N.T. 32)

g. On May 28, 1976, Appellant failed to report for duty and did not make any report of his absence or intent to be absent. In his report of excused absence, he stated that he had been absent due to illness, but subsequently recanted and admitted that he had overslept. (E. 16, 17, 18, N.T. 33-36)

h. On September 14, 1977, Appellant called the school at 9:00 A.M. to say that he would not be reporting for duty that day. (E. 21, N.T. 49)

i. On October 5, 1978, Appellant failed to report off and was absent from duty. (E. 24, N.T. 52)

9. Following all the incidents cited in paragraph 8 above, Appellant was notified by the Administration that his conduct was in violation of established procedures, adversely affected the educational program given his students, and was considered of serious enough magnitude to warrant dismissal proceedings if the conduct was repeated. Appellant was also given the opportunity to discuss each incident with an administrator. (E. 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 17, 21, 24)

10. Appellant was docked one day's pay for each of his absences on February 13, 1975, October 27, 1975, May 28, 1976, September 14, 1977 and one-half day for his tardiness on June 13, 1975 (E. 8, 10, 11, 14, 15, 17, 18, 19, 21).

11. The School District's administrative procedures in effect during the relevant period set forth a procedure for reporting an absence from work whereby the employee was to phone the school secretary by a designated hour to allow the school sufficient time to make the necessary arrangements to employ a substitute teacher. Appellant was aware of the regulation regarding the reporting procedure for a teacher who would not be available for duty. The procedure was essentially the same for the high school and for the Park Avenue School during the period in which Appellant taught in those buildings. (E. 3, 4)

12. Appellant maintained and used lesson plans for some classes. The policy at the Bethel Park Senior High School and at the Park Avenue Junior High School is that lesson plans are required but do not have to be submitted to the administration. (N.T. 37,75)

13. Donald Nicoll, the Principal of the Park Avenue School, observed Appellant's geometry class on February 22, 1978. At the conference held to discuss that observation, the Principal requested to see Appellant's lesson plan book and was informed that Mr. Behn did not have lesson plans. (N.T. 56-57)

14. By memorandum dated March 1, 1978, the Principal notified Appellant that his failure to maintain a lesson plan book violated the procedures manual for teachers. (E. 22)

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DISCUSSION

I.

In his Petition for Appeal and in his brief, Appellant raises two procedural issues. First, Appellant contends that the statement of charges dated January 8, 1979, was signed by Frank L. LaValle, Board secretary and director of business affairs, and not signed by the president of the school board and attested to by the secretary as required under Section 1127 of the School Code (24 P.S. §11-1127). The issue, therefore, is whether the absence of the signature of the president of the school board constitutes the denial of due process to the extent that the Secretary of Education should remand the matter for further proceedings before the school board.

We conclude that this defect in following the procedures set forth under Section 1127 does not require a remand. In all other respects, the school board followed the procedures set forth under Section 1127. There is no showing in the record of any way in which this defect has prejudiced Appellant. He had statutorily adequate notice of the charges to be heard at the hearing. At the hearing, he was represented by his own counsel, he had sufficient opportunity to offer testimony and to cross-examine witnesses testifying against him. The board retained an independent hearing officer who prosecuted the case against Appellant.

The record is absent of any showing of even the appearance of prejudice to Appellant by this omission. A single, technical variation from Section 1127 of the Code does not necessarily constitute reversible error if there is sufficient compliance and the professional employee is not prejudiced. Howe v. Board of School Directors of the Riverside Beaver County School District, Teacher Tenure Appeal No. 296-1976;

See Appeal of Board of School Directors of Cass Township, 151 Pa. Super. 543, 20 A.2d 628 (1943).

Appellant's second procedural issue involves the requirement under Section 1129 of the Code that two-thirds of the total members of the Board who have given a full, impartial and unbiased consideration of the record must vote affirmatively for dismissal. That Section provides as follows:

> Vote Required for Dismissals. After fully hearing the charges or complaints and hearing all witnesses produced by the board and the person against whom the charges are pending, and after full, impartial and unbiased consideration thereof, the board of school directors shall by a two-thirds vote of all the members thereof, to be recorded by roll call, determine whether such charges or complaints have been sustained and whether the evidence substantiates such charges and complaints, and if so determined shall discharge such professional employe. If less than two-thirds of all of the members of the board vote in favor of discharge, the professional employe shall be retained and the complaint shall be dismissed.

Five members of the nine member Bethel Park Board of School Directors were present at the hearing on January 18, 1979. At the special meeting of the Board, convened on February 5, 1979, a roll call of the members of the Board showed that seven members were present, four of whom had attended the hearing on January 18, 1979. At that meeting, the following resolution was introduced, seconded and passed by unanimous vote:

> That based upon the evidence presented at the formal hearing on January 18, 1979, it has been determined that Douglas A. Behn is guilty of persistent negligence and persistent and willful violation of the school laws of the Commonwealth of Pennsylvania, and is therefore dismissed from his position as a professional employe for the Bethel Park School District pursuant to Section 1122 of the Public School Code of 1949, as amended.

The information concerning the names of the seven Board members present at the hearing on February 5, 1979, together with a text of the resolution, is contained in an affidavit dated May 24, 1979, sworn to by Frank R. LaValle and offered by the school district solicitor. That affidavit was made a part of the record.

The Board had nine members. A quorum of the Board therefore was present at the hearing on January 18, 1979, and two-thirds of all the members of the Board, in a vote recorded by roll call, affirmatively voted to dismiss the appellant. The resolution further recited that the Board members voting at the meeting on February 5, 1979, who had not been present at the hearing on January 18, 1979, based their votes "upon the evidence presented at the formal hearing on January 18, 1979." This is consistent with Boehm v. Board of Education of the School District of Pittsburgh, 30 Pa. Commw. Ct. 468, 373 A.2d 1372 (1977). In that case, the Court held that a quorum of the school board should be present during the taking of testimony in a dismissal hearing but each board member does not have to listen to all the testimony to vote.

The board also need not show on the record that all board members voting considered all the evidence presented. In Board of Public Education of the School District of Pittsburgh v. Pyle, 37 Pa. Commw. Ct. 386, 390 A.2d 904 (1977), the Court stated:

> It was not proved nor can we assume in these circumstances, that the four board members who did not participate in the dismissal hearing, did not give "full, impartial and unbiased consideration" to the records produced before the Board.

Moreover, in the present appeal, counsel for the board requested at the hearing on January 18, 1979, that the record be kept open until all members of the Board were provided with transcripts of the hearing. Counsel for the Board also requested that the hearing not be deemed concluded until all members of the Board had the opportunity to review the transcript. The resolution of dismissal itself states that the vote is based upon a consideration of the record.

In his brief, Appellant contended that since he did not know at the time how many of the five board members present at the hearing actually participated in the voting at the special meeting, he could be faced with the situation in which a majority of the members voting for dismissal were not in attendance at the hearing itself. Based upon the affidavit, that was not the case. Of the four members who were present at the formal hearing on January 18, 1979, who voted at the special meeting on February 5, 1979, each voted for dismissal. We therefore conclude that there is no merit to Appellant's argument that Section 1129 of the Code was violated by the Board in its vote for dismissal.

We find that there are no procedural violations that would be grounds for the remand of this appeal for a new hearing.

II.

Appellant next contends that there is not sufficient evidence in the record to support the Board's dismissal of him for persistent negligence and for persistent and willful violation of the school laws. We have reviewed the record to determine whether or not there is substantial evidence on the record to support the Board's judgment. See Landi v. West Chester Area School District, 23 Pa. Commw. Ct. 586, 353 A.2d 895 (1976); Caffas v. Board of School Directors of Upper Dauphin Area School District, 23 Pa. Commw. Ct., 578, 353 A.2d 898 (1976).

The Board charged Appellant with nine incidents of unauthorized and improperly excused absences over an eight-year period. The gravamen of this charge was that Appellant simply refused to notify the administration in a timely fashion when he was going to be absent from school pursuant to the administrative procedures in effect at that time. The procedures that Appellant was charged with violating were instituted so that there was sufficient time to make the necessary arrangements to employ a substitute teacher.

The Board showed that Appellant had violated administrative procedures on nine occasions from May 12, 1971, through October 5, 1978. (Finding of Fact 8) One occasion occurred on May 12, 1971, and another on July 21, 1972. With respect to two more absences on October 9, 1975, and October 27, 1975, Appellant told the principal of the Park Avenue School that prescribed medication caused him to oversleep. Appellant further informed the director of staff relations for the Bethel Park School District in reference to the absence of October 27, 1975, that he was under the care of a physician. The director requested a physician's statement verifying Appellant's excuse, but Appellant never produced one. Under the Teachers' Procedure Manual, a physician's excuse was required only after an absence in excess of three days. With respect to a fifth absence which occurred October 5, 1978, Appellant had properly reported off on the preceding day but failed to call again about the absence on October 5. The Appellant violated reporting procedures on May 28, 1976, and on September 14, 1977. With respect to his absence of May 28, 1976, Appellant initially reported that he had been absent because of illness but later recanted and admitted that he had overslept.

The Teacher's Procedure Manual in use during the relevant period provided that if a teacher was ill and had to remain at home, he should immediately call a district secretary, preferably by 11:00 P.M. the night before or after 6:30 A.M. and no later than 7:00 A.M. of the day of the absence in order to allow the school sufficient time to make the necessary arrangements to employ a substitute teacher. Appellant was aware of the regulation regarding the reporting procedure for a teacher who was not available for duty. The procedure was essentially the same for the high school and for the Park Avenue School during the period in which Appellant taught in those buildings.

The regulations in the Teacher's Procedure Manual come within the scope of the term school laws. Harris v. Secretary of Education, 29 Pa. Commw. Ct. 625, 372 A.2d 953 (1977). Violations of these regulations would therefore constitute a violation of the school laws. The critical questions are whether those violations were "willful" and "persistent." Case law provides definitions for these terms.

First, it is necessary to answer whether the conduct is "willful." In Sinton's Case. 151 Pa. Super. 543, 30 A.2d 628 (1943), the court said: "(W)illful obviously suggests the presence of intention, and at least some power of choice."

In Johnson v. United School District Joint School Board, 201 Pa. Super. 375, 191 A.2d 897 (1963), a temporary professional employee was dismissed for a refusal to attend an open house. In Lucciola v. Delaware Valley School District, 24 Pa. Commw. Ct. 419, 360 A.2d 310 (1976), the professional employee was dismissed for using personal and sick leave to go on a five day skiing vacation with a student. The professional employee had submitted false reasons for his absences. In both of these cases, the courts held that the conduct constituted willful violations of the school laws.

The intent in these cases must be compared with Appellant's behavior. In Johnson the violation involved stubborn insubordination and arrogant refusal to comply with an administrative request on the part of the temporary professional employee. Lucciola involved deliberate deceit. In both cases, the dismissed teacher had exercised a strong willfullness in his or her actions.

By comparison, in the present appeal, Appellant on most occasions was not deceitful but candid about his conduct. For example, with respect to his absence on May 28, 1976, he said that he had fallen asleep watching a movie and had forgotten to set his alarm clock. The record discloses only one incident in which Appellant lied about the reason for his absenteeism or tardiness but also shows he promptly recanted and admitted the real reason. Nor was Appellant arrogant. He admitted several times that he "deserved to be docked." Accordingly, Appellant's conduct was unlike the teachers' conduct in Johnson and Lucciola. Appellant was not arrogant in his attitude but contrite; he was not deceitful but, as the record shows, generally candid.

However, we agree with the Board that Appellant's attitude, reflected in the incidents of tardiness and unexcused absenteeism, was careless and willful. His excuses of over-sleeping, watching a late movie, or failing to set his alarm clock reflect carelessness. At some point following the series of warnings given by the District to Appellant that his carelessness could lead to his dismissal, Appellant's conduct constituted a deliberate refusal to heed the warnings of his supervisors. This deliberate refusal falls within what the court's have defined as "willful." Since his conduct as to willfulness has been proven, his acts have also been proven to be negligent. See Davies v. Big Springs School District, Teacher Tenure Appeal No. 17-77.

We find that Appellant's conduct was persistent in the sense of being "continuing" or "constant". In Lucciola, the court viewed five consecutive days as constituting a sufficient series of events to be persistent. In Johnson, the teacher did not attend a single open house. However, the court found "persistence" in her announced refusals to her superiors that she would not attend open house. Following the logic of Lucciola and Johnson, nine separate failures to inform the District of absences following eight specific notices to the employee of his responsibility to report in by a specified time are "persistent."

As stated by Mr. Justice Musmanno,

> "No large organization can survive without orderly procedure and graduation of responsibility. Discipline is required not only in the military. It is indispensable in every establishment in civilization if anarchy and catastrophe are to be avoided. * * * What would happen to all organized society if government employees could close their eyes to directives which control the intermeshing of the vast complicated gears of governmental machinery?" Board of Education of Philadelphia v. August, 406 Pa. 229, 250, 251, 177 A.2d 809, 819 (1961).

The Appellant closed his eyes to a directive setting up procedures, to a a series of memoranda and to the docking of his salary. The District was more than fair in its announced warnings and its impositions of sanctions less than dismissal. To ask anything more from the Board would render it powerless to enforce directives which were in the best interests of students and their education.

The burden of proof is on the Board to show that Appellant engaged in a continuing course of negligent or willful conduct. Horosko v. School District of Mount Pleasant Township, 135 Pa. Super. 102, 4 A.2d 601,

(1930) rev'd on other grounds, 335 Pa. 369, 6 A.2d 866 cert. denied 308 U.S. 553 (1939). We conclude that there is substantial evidence in the record to support the Board's dismissal of Appellant with respect to his failure to follow the reporting procedures regarding his absenteeism and tardiness. The Board has not carried its burden of proof with respect to its allegation that Appellant repeatedly excused his absences from duty with uncorroborated and false information. With respect to its charge that Appellant failed to maintain lesson plans, the principal of the Park Avenue School testified that after observing Appellant's class on February 22, 1978, he requested Appellant's lesson plan book. The Appellant told him that he did not have lesson plans. In his direct examination during his hearing before the Board, Appellant testified that he prepared lesson plans and used them in his class. Based upon Appellant's denial of the charge, and considering that his remark to the principal may have been limited to the particular class being observed, we conclude that there is not substantial evidence in the record to support this charge.

Accordingly, we make the following:

ORDER

AND NOW, this 12th day of December , 1979, it is hereby ordered and decreed that the Appeal of Douglas A. Behn be and hereby is dismissed and that the decision of the Board of School Directors of the School District of Bethel Park, Pennsylvania, dismissing him as a professional employee on the grounds of persistent negligence and persisten and willful violations of the school laws, be and hereby is affirmed.

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

ALBERT G. BURTON, :
Appellant :
:
v. : Teacher Tenure Appeal
BOARD OF SCHOOL DIRECTORS : No. 3-79
OF THE GENERAL BRADDOCK :
AREA SCHOOL DISTRICT :
Appellee :

OPINION

Albert G. Burton, Appellant herein, has appealed from a decision of the Board of School Directors of the General Braddock Area School District reassigning him to a new administrative position. This Appeal is taken in accordance with sections 1131 and 1151 of the Public School Code, Act of March 10, 1949, P.L. 30, art. XI, § 1131; 24 P.S. § 11-1131 and Act of August 8, 1963, P.L. 564, § 10; 24 P.S. § 11-1151, as amended (hereinafter the "Public School Code").

FINDINGS OF FACT

1. Appellant is a professional employee of the General Braddock Area School District (hereinafter referred to as the "School District") within the meaning of that term as defined in the Public School Code.

2. Appellant holds a Bachelor of Science Degree in Education, a Masters Degree in Guidance and Counseling, and a Masters Degree in Administration.

3. Appellant has worked for the School District for a period in excess of thirty-one years.

4. Appellant has held numerous capacities as an employee of the School District, including that of teacher of Industrial Arts, teacher of Mathematics, teacher of Driver Education, Guidance Counselor, Guidance Director, School Psychologist, Supervisor of Guidance Services and High School Principal.

5. Appellant is certificated as a teacher, principal, supervisor and superintendent.

6. The School District initiated preparation of a long-range plan during 1976 at the direction of the School Board and the said plan was finally approved by the School Board on May 18, 1978.

7. The Department of Education approved the School District's long range plan on October 19, 1978.

8. The long-range plan provided for a new position designated as "Curriculum Coordinator" which was to be an administrative position concerned with the strengths, weaknesses, goals and program requirements of the District among other items.

9. The long-range plan vests responsibility for implementation of District-wide education goals in the Curriculum Coordinator.

10. Immediately prior to August 10, 1978, Appellant held the position with the School District of High School Principal.

11. By letter of August 10, 1978, received by Appellant on or about August 11, 1978, Appellant was advised by Rocco Stio, Superintendent of the School District, that he had been reassigned to a position designated as "Coordinator of Instruction - Grades Seven through Twelve".[1]

12. The Board of School Directors of the School District did not take action approving the change in position of Appellant prior to August 11, 1978.

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[1] All parties have previously stipulated that the titles "Coordinator of Instruction" and "Curriculum Coordinator" were synonymous.

13. Appellant did not receive a hearing on the change of position prior to August 11, 1978.

14. Subsequent to August 11, 1978, Appellant received a description of the position of "Coordinator of Instruction" which described the responsibilities and attributes of the position.

15. The description of the position delivered to Appellant was prepared by Superintendent Stio at Appellant's request.

16. Appellant's salary and compensation in the new position were designated initially as negotiable but were not reduced from the total package of compensation benefits to which Appellant was entitled as High School Principal.

17. Pursuant to the organizational chart of the administration of the School District, Appellant's new position of "Coordinator of Instruction" was the third ranking position in the School District below Superintendent and Assistant Superintendent.[2]

18. Appellant lost no tenure rights via the reassignment.

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[2] The chart itself appears to list the position as "Director of Secondary Education".

19. At the time of the reassignment, Appellant was offered an opportunity to select the title for the new position as well as to negotiate a salary increase.

20. Appellant has not negotiated any salary increase with the School District.

21. On or about August 16, 1978, Appellant sought, by filing a suit in equity in the Court of Common Pleas of Allegheny County, equitable relief from the reassignment.

22. On or about August 23, 1978, the School District, by amicable agreement with Appellant, acquiesced in the issuance of an Order from said Court directing the holding of a hearing pursuant to section 1151 of the Public School Code of 1949.

23. By agreement of counsel, the hearing pursuant to section 1151 was convened on August 25, 1978, before the full membership of the Board of School Directors.

24. At said hearing, the School Board employed the services of a special counsel.

25. During said hearing, testimony and exhibits were received by the Board of School Directors relating to the claim of Appellant that his reassignment in fact constituted a demotion.

26. Subsequent to said hearing, the special counsel retained by the Board of School Directors prepared a document entitled "Findings of Fact, Conclusions of Law and Decision of the Board of School Directors" which found that Appellant was in fact promoted, and not demoted, and sustained the reassignment of Appellant.

27. The document referenced hereinabove prepared by the special counsel was distributed to all nine members of the Board of School Directors.

28. All of said Board of School Directors signed said document prepared by the special counsel, five approving the findings set forth therein and four disagreeing with the said findings.

29. At a regular meeting of the Board of School Directors held January 18, 1979, Appellant's job title was changed to "Supervisor of Curriculum Coordination of Secondary Education".

30. By letter dated February 27, 1979, and received by the office of the Secretary of Education on March 1, 1979, Appellant filed a Petition for Appeal from the said determination of the majority of the Board of School Directors of the School District.

31. By notice duly filed in conformity with regulations of the Department of Education, counsel for Appellant signified his intention to offer testimony of three witnesses who were members of the School Board at all relevant times at the hearing on Appellant's case.

32. The hearing of Appellant's case was originally scheduled for March 27, 1979, but at the request of counsel for Appellant, said hearing was rescheduled for April 11, 1979.

33. At said hearing on April 11, 1979, Appellant offered the testimony of Elmer Devay and waived testimony from Richard Aiello and John Kopay.

DISCUSSION

Section 1151 of the Public School Code establishes the basic considerations which must be made in evaluating claims of alleged demotions such as exist in the present case. That section, in pertinent part, provides as follows:

> [T]here shall be no demotion of any professional employe either in salary or in type of position, except as otherwise provided in this act, without the consent of the employe, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the Board of School Directors . . .

Arising from this section are certain basic principles which have been elucidated by the Courts of the Commonwealth and which provide to us the guidelines for determination of demotion cases. These guidelines were set forth in the Opinion of Judge Rogers in Lucostic v. Brownsville Area School District, 6 Pa. Commonwealth Ct. 587, 590-591, 297 A.2d 516, 518 (1972). In that case, the principles to be applied in evaluation of demotion cases were listed along with the authority from which each was drawn:

> (1) A Board of School Directors may demote a professional employee in position or salary or both without his or her consent (Tassone v. Redstone Township School District, 408 Pa. 290, 183 A.2d 536 (1962));
>
> (2) The action of the Board in such case is presumptively valid (Hibbs v. Arensberg, 276 Pa. 24, 119 A. 727 (1923)); and
>
> (3) The demoted employee contesting the Board's action has the burden of proving it to be arbitrary, discriminatory or founded upon improper considerations (Smith v. Darby School District, 388 Pa. 301, 130 A.2d 661 (1957); Lakeland Joint School District v. Gilvary, 3 Pa. Commonwealth Ct. 415, 283 A.2d 500 (1971)).

In Commonwealth of Pennsylvania, Department of Education v. Kauffman, 21 Pa. Commonwealth Ct. 85, 92, 343 Pa. 391 (1975), the Commonwealth Court clearly held that the application of these principles required the professional employee claiming the existence of a demotion to bear the burden of proof of the threshold issue that a reassignment in fact constituted a demotion.

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In determining the presence or absence of an actual demotion, the generally cited decision of the Pennsylvania Supreme Court in Smith v. Darby School District, 388 Pa. 301, 303-4, 130 A.2d. 661, 664 (1957), is particularly appropriate:

> A demotion of a professional employee is a removal from one position and an appointment to a lower position; it is a reduction in type of position as compared with other professional employees having the same status. . .[citations omitted]

Accord: Commonwealth v. Kauffman, supra, at 92. The Courts, however, have also been careful to indicate that a demotion may occur in type of position alone, even though the salary remains the same. Smith v. Darby School District, supra, at 304.

Application of these authorities requires Appellant in this case to establish the threshold determination that he has in fact been demoted as a result of his reassignment from High School Principal to Supervisor. On careful review of what is at times a confusing record in this case, we conclude that Appellant has failed to sustain his burden in this regard.

Appellant's argument supporting his claim that a demotion in fact occurred at the time of his reassignment is based upon several contentions. Initially, Appellant claims that his reassignment is a demotion because as a High School Principal he had authority over specific numbers of teachers, administrative personnel, students and a physical facility in the form of a high school building. Appellant claims that his reassignment to a new administrative position effectively removed this authority. While we agree that the "factor of command" is one criterion upon which reassignments may be evaluated as demotions, we do not believe it is conclusive in this case. The record includes three documents which we believe indicate that Appellant received a new form of authority in place of his prior authority. The long-range plan, the District's organizational chart, and the job description for Appellant's new post all tend to indicate that Appellant in fact was given authority for determining various educational program objectives and educational functions for the entire District at the secondary level. This new authority is at least arguably greater than the authority which Appellant relinquished in assuming his new position. On this basis, we believe that the record confirms substantive authority vested in Appellant after the reassignment. We find nothing in the record of this case sufficient to warrant a determination that Appellant lacked substantive administrative authority subsequent to the reassignment.

Secondly, Appellant argues that the job description prepared by the Superintendent for Appellant's new position on its face demonstrates a reduction in Appellant's responsibilities and authority. Appellant's argument in this regard appears primarily focused upon the utilization by the Superintendent in the description of terms such as "aid" and "assist." We believe that this argument lacks substance and is merely reliance upon semantics. Even a cursory reading of the twenty-seven individualized functions specified in the job description leaves the clear impression that Appellant, in his new position, is vested with determination of program goals and program needs for the District (as opposed, for example, to a single school). Appellant's new job title, despite the confusing changes through which it evolved, clearly includes the word "coordination" which strongly implies that the new position in fact constitutes a link between lower administrative personnel and those superior to Appellant in the District. Consideration of the District's organizational chart places the Appellant between the Superintendent and the Assistant Superintendent on one hand and High School Principals on the other. Thus, logically, the new position places Appellant in a conduit role designed to facilitate interaction between principals who are lower administrative personnel and the Superintendent or Assistant Superintendent. The record of this case is devoid entirely of any professional judgment, other than Appellant's own opinions, which would contradict the documents submitted by the School District. For that reason, we find that Appellant's argument in this regard is not sustained nor supported by the materials now before us.

Thirdly, Appellant argues (at times by innuendo) that the Superintendent of the School District deliberately, and perhaps maliciously, caused the reassignment of Appellant for competitive reasons. We reject this argument completely. Unless supported by factual data which is completely absent in the present case, we believe that charges of such conduct are inappropriately raised and should be summarily dismissed in hearings before the Secretary of Education.

The final challenge mounted by Appellant in support of his argument that a demotion has occurred focuses on what appears to be a claim that Appellant has been reassigned to a position which is not encompassed by the term "professional employee" under the Public School Code. In this regard, Appellant is arguing that he is no longer protected by the tenure provisions of the Code. We acknowledge that the record indicates an unusual degree of confusion in the establishment of a title for Appellant's new position. It seems self-obvious to us that administrative reassignments can be sufficiently planned in advance to avoid unfortunate and haphazard redefinition at the time serious reassignments are undertaken. Nonetheless, the record in this case shows a final determination by the School Board on January 18, 1979, designating the new position as one of "Supervisor", a position falling within the ambit of section 1101 of the Public School

Code. On this basis, the citation by Appellant of such cases as Fiorenza v. Board of School Directors of the Chichester School District, 28 Pa. Commonwealth Ct. 134, 367 A.2d. 808 (1977) is inappropriate. The Fiorenza decision involved an administrative post which did not fall within the definition of "professional employee" under section 1101, and further did not involve, as the instant case does, a situation in which the Appellant was certificated as a supervisor, the position to which the Appellant had been reassigned.

On this basis, we conclude that the record before us indicates that Appellant suffered no reduction in salary, lost no tenure rights, received new and perhaps superior authority for that authority which he lost by reassignment, and has failed to demonstrate any relevant factor supportive of his contention that he was demoted. As a consequence, we must conclude that no demotion has been demonstrated. On this basis, it is unnecessary to reach Appellant's additional arguments.

We do, however, take note in this case of a procedural matter which is arising with increasing frequency in cases of this sort. The record of the case appears to indicate a failure by the School District to accord to a professional employee a procedural right to a hearing which is mandated by section 1151 of the School Code. The Pennsylvania Supreme Court in Smith v. Darby School

District, supra, at 319, interpreted this section to impose upon a school board a statutory duty to grant a hearing to a professional employee when the employee claims he has been demoted. School districts may not avoid the hearing requirement by determining initially that demotions did not in fact occur. Needless wastes of time and expense for all parties can be avoided in the future if districts will accept this duty without having it imposed upon them by either this Department or the courts. In the present case, Appellant was accorded the public hearing required by statute after submission of the issue to the courts. Although Appellant maintains that he was denied some form of due process as a result of the preparation of a document setting forth findings of fact and conclusions of law by a special counsel to the School Board, we find that the record of this case establishes without question consideration by each member of the School Board of the issues raised at Appellant's hearing. A majority of the School Board found that no demotion had in fact occurred, and we confirm that finding herein.

Accordingly, we make the following:

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ORDER

AND NOW, this 2nd day of July, 1979, it is hereby Ordered that the decision of the Board of School Directors of the General Braddock Area School District is affirmed and the Appeal of Albert G. Burton is accordingly dismissed.

Robert G. Scanlon

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

C. MICHAEL NOBLE, Appellant	:	
v.	:	Teacher Tenure Appeal No. 4-79
LINCOLN INTERMEDIATE UNIT No. 12, Appellee	:	

OPINION

C. Michael Noble, Appellant herein, has appealed from the decision of the Lincoln Intermediate Unit No. 12 denying him the status of a professional employee and the rights and privileges of that status.

FINDINGS OF FACT

1. Appellant is a graduate of Millersville State College and is permanently certified by the Department of Education in the education of the emotionally disturbed, elementary guidance and counselling.

2. Prior to his employment by the Lincoln Intermediate Unit Appellant served as an employee of the Berks Intermediate Unit for four years. During those four years he was observed, rated satisfactory, awarded tenure, and achieved the status of professional employee.

3. Appellant resigned his position in the Berks Intermediate Unit to pursue full-time graduate work in guidance and counselling and

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successfully completed a Masters program at Shippensburg State College on August 5, 1977.

4. On July 20, 1977, Appellant made application for a position with the Lincoln Intermediate Unit. The application indicated by mark that he was seeking a full-time position.

5. On August 19, 1977, Appellant was interviewed for a position by Robert L. Lindsey, supervisor of the program for the learning disabled and brain injured.

6. At the time of Appellant's initial interview, the Intermediate Unit needed to fill four full-time positions because there had been four resignations.

7. At no time during the initial interview was Appellant advised that he was being considered for employment as a substitute.

8. At approximately 5:15 on August 19, 1977 Appellant was contacted by Mr. Lindsey and advised that he was to be placed in a teaching position at the Wrightsville Elementary building in the Eastern York School District, teaching in the program for the brain injured.

9. Appellant accepted the Wrightsville position and reported for the first in-service day on the following Monday, August 22, 1977.

10. At the conclusion of the in-service program Appellant reported to his classroom and began his duties.

11. Appellant was assigned to the Wrightsville Elementary School building, teaching a class of brain injured students which had previously been taught by Karen Hale, another professional employee of the Lincoln Intermediate Unit. Karen Hale was not on maternity leave during the

1977-78 school year. She was not absent. She was an active employee of the Intermediate Unit, teaching in the West York School District.

12. The position Appellant occupied was created as a result of resignations from the professional staff of the Intermediate Unit.

13. None of the four positions to be filled in August of 1977 involved maternity leave.

14. During the first days of September, 1977, Appellant was summoned to Mr. Lindsey's office and advised that he would not be recommended to the Board as a full-time professional employee but rather as a day-to-day substitute until such time as Mr. Lindsey had an opportunity to evaluate his performance.

15. Although there were several "alterations" in Appellant's status during the year, his responsibilities never changed. From the opening of the school year on August 22, 1977 until the conclusion of the year in June of 1978, Appellant was assigned to and served as the teacher of brain injured children in the Wrightsville Elementary School building of the Eastern York School District.

16. The first recorded Board action with regard to Mr. Noble came on October 4, 1977 when he was referenced as an addition to the approved list of substitute teachers.

17. On October 20, 1977, Mr. Lindsey observed Mr. Noble in his classroom. Mr. Lindsey indicated that the observation was an informal one and no official observation form or rating instrument was utilized.

18. Mr. Lindsey made a recommendation to the Board that Appellant be hired as a maternity leave substitute for Karen Shettle.

19. At the November 1, 1977 meeting of the Board of Directors, Executive Director Karam nominated Mr. Noble as "a full-time substitute for the 1977-78 school year in the brain injured program effective August 22, 1977 based on 190 days, at the annual salary of $8,700, Category D, Step 1." At the same meeting Executive Director Karam presented 12 other employment recommendations and all 13 recommendations were adopted by the Board of Directors.

20. At the November 1, 1977 meeting of the Board of Directors, Executive Director Karam proposed a change in status of Miss Cheree Shultz from full-time substitute to that of a teacher in the Brain Injured Program, effective as of August 22, 1977. Miss Schultz has previously been hired and had been serving as a maternity leave substitute for Karen Shettle.

21. On December 7, 1977, Paul M. Ricker, Assistant Executive Director of the Intermediate Unit, forwarded a "employee agreement" dated August 22, 1977 and signed by the President and Secretary of the Board to Appellant. The covering letter attached to the "employee agreement" indicated that it was a temporary professional employee contract and requested Appellant to execute the agreement and return it to the District.

22. Appellant did not execute the agreement and did not return it to the office.

23. The proffered "employee agreement" does not say anything about substitute or maternity leave employment. The "employee agreement" provides that it "is subject to the provisions of the Public School Code of 1949." The only conditions set forth in the agreement involve maintenance of appropriate certification, which Appellant held at all times.

24. Appellant was never tendered a professional employee contract in accord with Section 1121 of the School Code, nor was he tendered any contract other than that requiring he serve as a temporary professional employee.

25. Appellant did not receive any unsatisfactory ratings during the 1977-78 school year.

26. Appellant was officially informed by letter dated July 20, 1978 that his assignment had terminated and that he would not be employed on a full-time basis beyond the end of the 1977-78 school year.

27. Appellant consented to a salary of $8,700 for the 1977-78 school year.

DISCUSSION

Having reviewed the Petition of Appeal, the record of the proceedings before the Board and the briefs and oral argument submitted by counsel, it is our conclusion that Appellant is a professional employee and that the procedural requirements of the School Code for the dismissal of a professional employee have not been satisfied.

Following are the issues which we recognize for consideration on appeal:

1. Is it mandatory that the contract of employment between a teacher and an intermediate unit be in writing as required by Section 1121 of the School Code, 24 P.S. §11-1121, for that teacher to qualify as a professional employee?

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2. Are school board minutes regarding professional employee status or the facts of employment of a teacher determinative of professional employee status?

3. Does the School Code require that a school board fill permanent vacancies with permanent employees so long as qualified personnel are available?

4. Was the position that Appellant filled such a permanent vacancy?

5. Did the performance of the duties of the position which Appellant occupied result in Appellant attaining the status of a professional employee?

6. Could Appellant prospectively contract away his rights to professional employee status or retrospectively consent to a demotion in status to substitute employee?

7. Did Appellant consent to a demotion in salary?

Six sections of the School Code are relevant to the present controversy. Section 1101 of the School Code defines the central terms which the Board must apply:

> (1) The term "professional employe" shall include those who are certificated as teachers, supervisors, supervising principals, principals, assistant principals, vice-principals, directors of vocational education, dental hygienists, visiting teachers, home and school visitors, school counselors, child nutrition program specialists, school librarians, school secretaries the selection of whom is on the basis of merit as determined by eligibility lists and school nurses.
>
> (2) The term "substitute" shall mean any individual who has been employed to perform the duties of a regular professional employe during such period of time as the regular professional employe is absent on sabbatical leave or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employe who is absent. [Emphasis added.]

> (3) The term "temporary professional employe" shall mean any individual who has been employed to perform, for a limited time, the duties of a newly created position or of a regular professional employe whose services have been terminated by death, resignation, suspension or removal. 24 P.S. §11-1101

Section 1106 of the School Code makes it the duty of the Board of School Directors to employ "the necessary qualified professional employes, substitutes and temporary professional employes to keep the schools open." Section 1108 of the School Code provides for the observation and rating of temporary professional employes and, contingent upon their satisfactory performance, the elevation of temporary professional employes to "professional employe" status. Section 1108 of the Code provides that a temporary professional employee, whose work has been found to be satisfactory during the last four months of the second year of his service,

> "shall thereafter be a 'professional employe' within the meaning of this article. . . . The employe shall be tendered forthwith a regular contract of employment as provided for professional employes. No professional employe who has attained tenure status in any school district of this Commonwealth shall thereafter be required to serve as a temporary professional employe before being tendered such a contract when employed by any other part of the public school system of the Commonwealth."
> 24 P.S. §11-1108. (Emphasis added.)

Section 1121 of the School Code sets forth the mandatory, uniform contract which must be used in all school districts for "each professional employe who has satisfactorily completed two (2) years of service in any school district of this Commonwealth." The mandatory professional employee contract provides, among other things that it "shall continue in force year after year . . . unless terminated by the professional employe by written resignation . . . or by the board of school directors by official written notice presented to the employee."

Section 963(e) of the School Code provides that all professional employees of an intermediate unit shall have the same rights of tenure as similar employees of a school district.

I

The Board argues initially that Appellant has no right to a hearing nor any right to continued employment because he had no written contract in the form mandated by Section 1121 of the School Code. Counsel for the Appellee cites the case of Gordon v. Board of Directors, 21 Pa. Commw. Ct. 616, 347 A.2d 347 (1975) in support of this contention. The Commonwealth Court in McCoy v. Lincoln Intermediate Unit No. 12, 391 A.2d 1119 (1978) rejected this same argument by this same Intermediate Unit stating that Gordon is not

> . . . determinative of the professional employee status of this appellant, for . . . [Gordon was] decided under Section 1121 of the Code, which, although it specifically requires contracts of professional employees of school districts to be in writing, does not apply to employees of an intermediate unit. 391 A.2d at 1122

Further, in October of 1978 the Pennsylvania Supreme Court handed down the decision in Commonwealth Department of Education (Bittner) v. Jersey Shore Area School District, 481 Pa. 356, 392 A.2d 1331 (1978) [hereinafter Bittner]. The Supreme Court reversed the Commonwealth Court which had held that, at a minimum, there must be a written contract between the teacher claiming professional employee status and the school board. 23 Pa. Commw. Ct. 624, 353 A.2d 91 (1976). The Supreme Court found that Bittner was a professional employee. Bittner was a certified reading teacher who was hired through a federally funded reading program. The school board did not issue Bittner a written contract and there were no school board minutes referencing that Bittner was ever employed by the school district. Bittner worked as a temporary professional employee without a contract and without board approval for two years; then she was discharged. The Supreme Court rejected the school district's argument that a written contract of employment approved by the school board was a necessary prerequisite to professional employee status and reiterated the conclusion of Mullen v. Board of School Directors of DuBois Area School District, 436 Pa. 211, 259 A.2d 877 (1969), that "the burden of complying with the statute rests with the school board."

Therefore, we conclude that an absence of a formal contract in accord with the requisites of Section 1121 of the Code is not determinative of professional employee status in this case.

II

Do the Board minutes control the Appellant's status? We conclude that they do not. The position of the Board is that Appellant was employed for a term certain, that his employment expired at the end of the 1977-78 school year and that he is not entitled to the status of professional employee. In the present case the Board minutes reflect not only that the Appellant was employed but also that his status was that of substitute teacher.

There are only three types of school employees: professional, temporary professionals and substitutes. Section 1108 makes it clear that once tenure has been secured the teacher can never again be a temporary professional employee. Since Appellant acquired professional employee status at the Berks Intermediate Unit, he cannot be a temporary professional employee. Therefore, a central question in this case is whether Mr. Noble was a professional employee as he claims or a substitute as the administration contends.

Because professional employee status is central to the tenure protections of the Public School Code (tenure applies only to professional employees and not to temporary professionals or substitutes), there have been a number of cases decided in this area. Phillippi v. School District of Springfield Tp., 28 Pa. Commw. Ct. 185, 367 A.2d 1133 (1977). A review of those cases indicates a decided shift in the emphasis which the courts place upon the actions of the school board as reflected in board minutes if those minutes do not reflect the factual reality of the employment situation.

Probably the leading statement of the old and now unacceptable principle that "the Board minutes always control no matter what" is found in Commonwealth ex rel. Hetrick v. School District of the City of Sunbury, 335 Pa. 6, 6 A.2d 279 (1939). In Hetrick, the Pennsylvania Supreme Court confirmed the substitute teacher status of an individual who was elected as a "supply teacher" to complete the term of a professional employee who resigned during the course of the school year. Rejecting the supply teacher's claim that she was entitled to be considered as a professional employee, the court held that the School Board minutes were controlling and that the evidence presented in the minutes could not be "supplemented or enlarged by extraneous evidence or by the actions or declarations of the officials of the school district." 6 A.2d at 281.

In the years since the decision in Hetrick a substantial erosion of the holding that "the Board minutes control" has occurred. It is clear that the board minutes regarding the status of an employee will control only if the position into which the employee is actually placed and the duties requisite to that position correspond with the status of the employee as reflected in the board minutes. Where the board minutes indicate that the teacher's employment status is something other than required by the position in which the teacher actually functions, the board minutes are to be disregarded and the teacher's status is to be determined solely by an evaluation of the position and function of the teacher. To hold otherwise would allow school boards to circumvent the tenure act and its philosophy.

Thirty years after the decision in Hetrick the Pennsylvania Supreme Court re-examined the significance of school board minutes when considering the professional employee status of teachers. In Mullen v. Board of School Directors of DuBois Area School District, 436 Pa. 211, 259 A.2d 877 (1969) the issue concerned the validity of a professional employee's contract where there was no recorded vote of the board with regard to that contract. In attempting to deprive Mullen of his professional employee rights the school board claimed that Mullen's professional employee contract was "void and unenforceable" because the vote thereon had never been recorded in the board minutes as required by Section 508 of the School Code. (24 P.S. §5-508) After determining that the board had in fact employed Mullen, the Supreme Court held "the requirement of a formal recorded vote to be directory only, although with the caveat that the proof from which board approval can be inferred must be solid." Concluding that any other result "would arm every school board in the Commonwealth with a tool by which they could regularly avoid otherwise valid contracts", the court stressed the legislative policy of the tenure act which was designed to "create an atmosphere hospitable to school teachers." The court continued:

> Our teachers ought not have the burden of being required to know all the statutes relative to their employment. Neither should they have to carefully examine the minutes of their hiring board in order to ascertain that each and every requirement was complied with. The burden of complying with the statute rests with the school board; should they fail to conduct their business as required, the consequences ought to lie at their door, not at the door of their victims. They must not be permitted to advantage themselves of their own failures to the detriment of their employees. 259 A.2d at 880-81

One should note that the Court overruled a long line of cases dating back to 1913 which had given a strict construction to the board vote requirement. See footnote 7 at 259 A.2d 880. The cases overruled in Mullen are among the cases relied upon by the Supreme Court 30 years earlier in deciding the Hetrick case.

Although the facts of the Mullen decision are limited to the failure to record a board vote, the principles set forth in Mullen have been relied upon to invalidate recorded board actions where the action of the board is inconsistent with the Public School Code. In Sakal v. School District of Sto-Rox, 19 Pa. Commw. Ct. 639, 339 A.2d 896 (1975) the Commonwealth Court, speaking through Judge Wilkinson, invalidated a school board resolution purporting to elect a professional employee for a one year period. The Court conferred permanent, tenured, professional employee status on the teacher. The Sto-Rox School Board had attempted to employ Mr. Sakal as "an assistant elementary school principal for a period of one year." An assistant elementary school principal, like a teacher, is a professional employee position. Mr. Sakal, like Mr. Noble, had served for more than two years in a professional employee position and was therefore tenured at the time he was hired.

When the Sto-Rox School District attempted to discharge Mr. Sakal it did so by resolution, without providing him with a statement of charges, a hearing or the other procedural requirements afforded tenured professional employees. It was the Board's position that Mr. Sakal had been hired on a one year contract, that the terms of the contract had expired and that the Board was therefore free to dismiss him without further reasons. In rejecting the school board position, Judge Wilkinson stated:

> If that statement represented the law, all that every school board need to do to emasculate tenure is to pass a resolution hiring a professional employee for only one year and then execute the standard form of contract.

Relying specifically upon *Mullen* the Court held that "board action inconsistent with the mandate of the statute could not be used by the board to deny an employee his proper rights in accordance with his contract." 339 A.2d at 898.

The Commonwealth Court's willingness to look beyond school board minutes and executed contracts to ascertain the true facts surrounding a school teacher's employment was further demonstrated in *George v. Commonwealth Department of Education*, 14 Pa. Commw. Ct. 239, 325 A.2d 819 (1974). Demonstrating that the facts can hurt as well as help a teacher, the Court found that a school board could not employ an inexperienced teacher as a professional employee prior to the completion of the mandatory two-year temporary professional employee period. The Court held that "the school district did not have authority to waive the two-year probationary period," and voided the professional employee contract which had been executed by the board.

In conclusion, therefore, we hold that the mandates of the Public School Code, not the Board, determine the status of an employee. An employee's status is determined by analyzing the certification, years of service, position and function of the employee.

III

As a result of the substantial protections afforded tenured professional employees a school district may be reluctant to confer such status on a new employee. The viability of this philosophy was at the heart of the Hetrick decision. This philosophy has given way to concerns over preserving a viable teacher tenure system. We have already observed in Sakal and Bittner the erosion of Hetrick.

In our opinion, Section 1101 of the School Code has been subjected to sufficient judicial interpretation to determine with certainty that substitutes can only be hired for true substitute positions; all other positions must be filled by permanent employees who either have or are in the process of securing tenure (professional employees or temporary professional employees).

The seminal case analyzing the substitute/permanent question was Love v. School District of Redstone Township, 375 Pa. 200, 100 A.2d 55 (1953). Love involved a teacher who was employed from September of 1941 through June of 1944 under a contract as a "elementary substitute teacher." The contract in question specifically provided that "it was not a tenure contract and terminated at the close of each of the school years for which it was signed." When the teacher was removed from her position she claimed that she was entitled to professional employee status, notwithstanding the terms of her written contract. In determining whether or not Love was a true substitute or a permanent teacher, the Pennsylvania Supreme Court analyzed the terms of the then applicable Teacher Tenure Act of 1939. The definitions of the terms "substitute" and "temporary professional employee" contained in the 1939 Act are identical to the definitions presently found in Section 1101 of the Public School Code. The Court stated:

> It is clear that the Legislature provided for two separate classifications to fill the positions created by the absence or leave of a professional employee. If the absence or leave were permanent then the position was to be filled by a temporary professional employee who later would be elevated to permanent status if found qualified. The vacancy which the Legislature intended a temporary professional employee to occupy is a position to which a teacher will not return. If there were no vacancy in this sense then this position was to be filled by a substitute. (Emphasis in original)

Unfortunately for the individual teacher in Love, the definitions which are presently in existence in Section 1101 of the Public School Code were altered as a result of the emergency created by the Second World War. The Teacher Tenure Act was amended by the Legislature by the Act of May 21, 1943, P.L. 273. The term "substitute" was amended by adding a proviso that a substitute could be employed "during the present war-time emergency and for a period not longer than one year beyond the cessation of hostilities, to fill a vacancy until an acceptable qualified teacher can be obtained." Ruling that this specific exception to the Tenure Act was applicable to the case before it, the court sustained the employment of the teacher as a substitute and refused to grant her professional employee status.

The special war time emergency provisions which created "long term substitutes" were repealed by the adoption of the Public School Code of 1949. The pre-war definitions of substitute and temporary professional were re-enacted as Section 1101 of the Public School Code. The test for determining whether a position may be filled by a substitute or whether it must be filled by a temporary professional (or a professional) employee is still valid. If the absence or leave is permanent, i.e. the teacher formerly in the position will not return to the position, then the position must be filled by a permanent employee if qualified personnel are available. If the absence or leave is temporary, then the position must be filled by a substitute employee.

It is now clearly established that the time at which the decision regarding the status of an employee is determined is the time when the position is created, and not some later date. In Tyrone Area Education Association v. Tyrone Area School District, 24 Pa. Commw. Ct. 483, 356 A.2d 871 (1976), the Commonwealth Court relied upon Love v. Redstone Township to determine that the school board had correctly hired a "full-time substitute" teacher for a single school term. In Tyrone a vacancy was created when a permanent professional employee took an educational sabbatical leave. The replacement for that sabbatical leave position was hired as a full-time substitute for the 1974-75 school term. Subsequent to the employment of the substitute teacher, the permanent teacher on sabbatical leave elected not to return to the district. The substitute teacher claimed that this after-the-fact election not to return automatically converted her into a temporary professional employee entitled to the protection of the School Code. Relying upon Love v. Redstone Township, the Commonwealth Court disagreed, stating,

> "At the time of her election, the vacancy which she was to occupy was a position to which the teacher was to return. This being so, there was no vacancy which a temporary professional employee could fill; consequently, a substitute was the appropriate classification."
> 356 A.2d at 872.

We conclude that the combined impact of Love v. Redstone Township and Tyrone is (1) that the position to be filled controls the status of the employee filling it; and (2) that the determination of the status of the employee filling the position is to be made at the time the position is filled and not at some later date.

IV

There was no conflict in the testimony between C. Michael Noble and Robert Lindsey the witness for the administration regarding the type of position which resulted in Mr. Noble's employment. Both men testified that the position was created as a result of resignations from the staff. The reference to Mr. Noble as a "maternity leave substitute" is a fiction created after his employment and designed to deprive him of the professional employee status.

On cross-examination Robert Lindsey testified as follows with regard to the hiring of Mr. Noble:

Q. And how many positions were available to be filled?

A. I believe it was four.

Q. And which one of those positions involved maternity leave?

A. None of those four.

Q. And isn't it a fact that all of those four involved teachers who had either resigned or moved to an area closer to their home or resigned for the purpose of furthering their education?

A. Yes.

Q. And isn't it a fact that there was no maternity leave position available in the district on the date of that interview?

A. Yes.

Therefore, we conclude that the position occupied by the Appellant was a permanent position which was vacant at the time he was hired.

V

We have recently recognized the central importance of the position and its responsibilities and the effect these have on determining the status of the employee who fills it. In the Appeal of James W. McDonald, Teacher Tenure Appeal No. 252 (decided on July 14, 1976), the Secretary of Education affirmed the professional employee status of the Appellant even though he had been hired under a contract which provided that he was to be employed for 202 days "for the remainder of the 1973-74 school term." McDonald is particularly instructive in determining the status of Mr. Noble because McDonald, like Noble, had already earned his professional employee status by serving as a temporary professional employee satisfactorily for a two year period. Relying on Section 1121 of the School Code, the Secretary of Education stated:

> Once a teacher has earned professional employee status, he is a professional employee for ever after, even though he interrupts his teaching position in one Pennsylvania school district and moves to another Pennsylvania school district.

The Secretary of Education first determined that the position filled would carry professional employee status. In McDonald the position was that of elementary guidance counsellor which does have professional employee status; in the present case the position of teacher is also one which carries professional status.

The Secretary continued:

> Since the position is one in which an individual is a professional employee, Appellant must be classified as either a "substitute" or "temporary professional employee" if he is to be denied the rights of a professional employee.

The Secretary then found that the Appellant could not be a substitute as defined in Section 1101(2) of the School Code because a substitute may only be employed to perform the duties of a professional employee, "during the period of time when that individual is absent." The Secretary found that the position which Mr. McDonald occupied was not created by an absence but was a vacancy. Relying upon Love v. Redstone Township, the Secretary ruled that a vacancy may not be occupied by a substitute.

Even though the School Board resolution which employed Mr. McDonald stated that he was elected "for the remainder of the 1973-74 school term" the Secretary found, following the logic of Sakal, that "a school board cannot emasculate tenure by passing a resolution and altering the standard form contract to hire the professional employee for a limited duration." The Secretary concluded:

> Appellee school district has attempted to create a fourth classification of teacher, i.e., professional employee hired for a limited period of time to fill the position vacated by a professional employee. If this new classification were permitted, the Appellant would waive his rights under Section 1127 of the School Code . . . in exchange for a contract of limited duration. Such a waiver violates Section 1121 of the School Code.

Finding that the board action was inconsistent with the School Code, the Secretary determined that the teacher was entitled to all the rights of a professional employee and ordered his reinstatement without loss of pay.

We believe McDonald to be determinative of the case at hand. We conclude that since:

(1) the position occupied by Appellant was a teaching position and

(2) said position was permanently vacant; and

(3) the Appellant had previously attained tenure; and

(4) the Appellant held the certification appropriate to the position;

that therefore, as soon as Appellant began functioning in the capacity of an employee of the intermediate unit in the position, he attained the status of professional employee.

VI

The Board has argued that the status of substitute of Appellant is the product of a demotion to which the Appellant consented. We reject this argument.

Section 1151 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. Section 11-1151, specifies the rights of an employee facing a demotion. That section provides in part:

> ". . . but there shall be no demotion of any professional employee either in salary or in type of position, except as otherwise provided in this act, without the consent of the employee, or, if such consent is not received, then such demotion shall be subject to the right of a hearing before the board of school directors and an appeal in the same manner as herein before provided in the case of the dismissal of a professional employee."

The term "demotion" was defined by the State Supreme Court in the case of Smith v. Darby School District, 388 Pa. 301, 130 A.2d 661 (1957) at 664;

> "A demotion of a professional employee is a removal from one position and an appointment to a lower position; it is a reduction in type of position as compared with other professional employees having the same status."

* * *

> ". . . a demotion in type of position means something more than a reduction in salary. To demote is to reduce to a lower rank or class and there may be a demotion in type of position even though the salary remains the same."

In the present situation Appellant was performing the same functions throughout his tenure at the Lincoln Intermediate Unit during the 1977-78 school year. He filled a single position. Therefore we conclude that there was no demotion nor could there be a demotion. The term demotion does not include the change in classification of employee status under Section 1101 of the School Code.

We further conclude that the prospective employee cannot contract away his rights under the tenure act. These rights are granted by statute and depend upon certification, the functions he performs and the position he holds. To hold otherwise would undermine the teacher tenure act and induce School Boards to exact a waiver of this sort from any and all new employees.

VII

Did the Appellant accept or consent to a reduction in salary to $8,700 per year? We conclude that the record taken as a whole reflects substantial evidence that Appellant consented to the pay rate of $8,700 no matter what other higher rate he may have been entitled to (N.T. Bd., Nov. 7, 1978, 38). A professional employee may consent to a specified salary provided that it is not below the statutory minimum.

ORDER

AND NOW, this 10th day of September, 1979 it is hereby ordered that the decision of the Board of Directors of the Lincoln Intermediate Unit No. 12 to the effect that C. MICHAEL NOBLE is not a professional employee be reversed and that Appellant be reinstated as a professional employee without loss of pay.

Robt G. Scanlon

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF EDUCATION

Harrisburg, Pennsylvania

IN RE:
APPEAL OF PATRICIA :
BRUMBAUGH, From A :
Decision Of The Board :
Of Directors Of The :
Tussey Mountain School : Appeal No. 5 - 79
District Not To Reinstate :
Her To A Position Pre- :
viously Held As A One- :
Year Appointment :

OPINION

Patricia Brumbaugh, Appellant herein, has appealed from a decision of the Board of Directors of the Tussey Mountain School District (hereinafter the "School District") not to reinstate Appellant to a position previously held by her as a one-year appointment. This Appeal is taken in accordance with Section 1131 of the Public School Code, Act of March 10, 1949, P.L. 30, art. XI, § 1131, *as amended*; 24 P.S. § 11-1131.

FINDINGS OF FACT

1. Appellant was permanently certified in Pennsylvania as an elementary school teacher and reading specialist in 1975.

2. On September 7, 1977 Appellant requested, in writing, a one-year leave of absence without pay from the Huntingdon Area School District, for purposes of educational and personal improvement.

3. Appellant had attained the status of a tenured professional employee at Huntingdon Area School District prior to said leave request.

4. On September 12, 1977 the School Board of the School District (hereinafter the "School Board") approved the hiring of Appellant for a one-year position as reading specialist and coordinator for the District's E.S.E.A. Title I Program, subject to approval of Appellant's request for a one-year leave of absence from the Huntingdon Area School District.

5. Substitute Superintendent George Clapper and Assistant Superintendent Walter Curfman confirmed the School Board's action by letter dated September 13, 1977.

6. Said letter limited the terms of employment to a one-year reading specialist internship for the 1977-78 school year (183 days) at a salary of $13,000.

7. On September 19, 1977 the Huntingdon Area School Board approved Appellant's request for unpaid leave for the 1977-78 school year, effective September 20, 1977.

8. The School District submitted to Appellant a written contract specifying the above-mentioned terms, signed and dated October 23, 1977 by the Secretary of the School Board.

9. Appellant did not sign the said contract.

10. Appellant performed duties as a reading specialist and co-ordinator for the School District for the 1977-78 school year and received the agreed compensation for her services.

11. At no time during the 1977-78 school year did Appellant resign from her position in the Huntingdon Area School District.

12. At the conclusion of the 1977-78 school year, Appellant notified the School Board by letter dated July 10, 1978 of her intention to remain with the School District in the position of reading specialist and co-ordinator.

13. On August 2, 1978 the School Board voted not to retain Appellant in the position previously held by her as a one-year appointment with the School District.

14. Appellant resumed her former position at the Huntingdon Area School District, with full tenured status on September 9, 1978, the first day of the 1978-79 school year.

15. Appellant requested and received a hearing before the School Board on January 24, 1979, at which she presented her objections to the School Board's action not to retain her and further claimed the right to reinstatement under the tenure provisions of the Pennsylvania Public School Code.

16. Subsequently, on February 12, 1979, the School Board voted not to reinstate Patricia Brumbaugh to her previous position, which decision is the subject of this Appeal.

DISCUSSION

The question raised in this appeal concerns the right of Appellant, a tenured professional employee on an approved one-year leave of absence from one school district, to assert tenure rights under Section 1108(b) of the Public School Code in a second school district at the completion of a one-year appointment therein. In other words, may a teacher invoke the protections of tenure in two school districts simultaneously?

At the outset, it must be recognized that this is a unique situation apparently not envisioned by the drafters of the Public School Code provisions establishing the teacher tenure system. Section 1108(b) specifically recognizes that a teacher is entitled to a permanent position under a continuing contract, as outlined in Section 1121, in any school district within the Commonwealth once that teacher has met the statutory requirements for tenure. That paragraph reads, in pertinent part:

> No professional employee who has attained tenure status in any school district of this Commonwealth shall thereafter be required to serve as a temporary professional employee before being tendered such a contract when employed by any other part of the public school system of the Commonwealth.

24 P.S. § 11-1108(b). Section 1108, however, when read in its entirety, clearly was intended to deal with the process by which a temporary professional employee attains tenure status. It does not address the special problem of a professional employee, already tenured, who serves in one school district while on a leave of absence from another.

In order to resolve the question, then, we must consider the initial purpose of the tenure provisions of the Public School Code: " . . . to maintain an adequate and competent teaching staff, free from political and personal arbitrary interference, whereby capable and competent teachers might feel secure and more efficiently perform their duty of instruction . . ." Ehret v. Kulpmont Boro School District, 333 Pa. 518, 524, 5 A.2d 188 (1939). Certainly, a protected, guaranteed position with one school district sufficiently fulfills this purpose. The additional protection of simultaneous tenure in a second district would be unnecessary. In the instant case, for example, the Appellant had the security of continued employment in the Huntingdon Area School District. The leave of absence was approved by the Huntingdon School Board, and regardless of whether it was considered a sabbatical under Section 1166 or a leave for professional study under Section 522.1, Huntingdon was required to reinstate her at the expiration of that period. 24 P.S. § 11-1168. In both types of leave, her seniority rights are explicitly protected. 24 P.S. §§ 5-522.1, 11-1170. Furthermore, any waiver of the requirement to return would be effective, of course, only at her own instigation. Since she never resigned her position with Huntingdon, she could return there if she so chose. Appellant did, in fact, resume teaching at Huntingdon, with no loss of seniority or salary, when the School Board declined to retain her for another year. In this regard, the tenure system worked precisely as it was designed to work.

Not only do we find that Appellant Brumbaugh preserved her rights at Huntingdon by requesting a leave of absence for one year only; we also find that she was fully aware of the limited nature of her relationship with the School District. The minutes of the School Board meeting of September 12, 1977, on which she said she relied for the terms of her employment, stipulated that it was a one-year position, subject to the approval of her leave request. This was confirmed by a letter to her from Superintendents Clapper and Curfman, as well as by the unsigned contract submitted to her in October.

To allow Appellant Brumbaugh to bootstrap herself into a permanent position upon completion of this limited one-year appointment without terminating her association with another school district would open the way to "tenure shopping" by teachers among the various school districts. Such a precedent would operate to disrupt the stability of the public school system, and would militate against the smooth maintenance of an adequate teaching staff in the individual districts. It would force the school district to accept a teacher into its permanent employ whom it intended to hire for the period of a leave of absence only. Thus, not only would "dual tenure" be an unnecessary safeguard for the employee, it would also interfere with the school board's management and control of local school policy, a result often recognized by the courts as not within the original contemplation of the legislature in enacting the tenure provisions in question. Ehret v. Kulpmont Boro

School District, supra; Welsko v. Foster Township School District, 383 Pa. 390, 393, 119 A.2d 43 (1956).

Nor would a finding for Appellee, if limited to the "dual tenure" situation, allow a school district to circumvent the tenure requirements, as Appellant contends. It would not permit the denial of tenure rights by hiring any professional on a one-year basis; it would only permit the hiring of a professional employee for a limited term in those cases in which the teacher has retained tenure rights elsewhere.

A finding for Appellee will facilitate another practice related to sabbatical leave entitlement. In the past the Secretary has advised school boards that it is permissible for a professional employee to qualify for a sabbatical leave from one school district and be employed by another school district. Employment in another school district may fall within the purpose of either health or study for which an employee is entitled to a sabbatical leave under Section 1166 of the School Code. Professional employees may enrich themselves professionally and benefit the school district by teaching in another school district with an entirely different student enrollment and faculty than their own district. A professional employee may seek restorative experience by requesting a sabbatical to teach in another school district where tensions may be less. Permitting school districts to hire a teacher on sabbatical leave for a limited duration will permit this practice.

For these reasons, we find for the Appellee School District and hold that Appellant, a tenured professional employee on a leave of absence from one school district, is not entitled to simultaneously invoke tenure rights in a second school district.

Accordingly, we make the following:

ORDER

AND NOW, this 10th day of September, 1979, it is hereby Ordered that the decision of the Board of Directors of the Tussey Mountain School District not to reinstate Appellant, Patricia Brumbaugh, in the position previously held by her on a one-year appointment is affirmed and the Appeal of Patricia Brumbaugh is dismissed.

Robt G. Scanlon

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF EDUCATION

Marjorie Brennan Appellant	:	
v.	:	Teacher Tenure Appeal 7-79
Berwick Area School District Appellee	:	

OPINION

Marjorie Brennan, Appellant herein, has appealed from the decision of the Board of Directors of the Berwick Area School District, dismissing her as a professional employee on the ground of persistent and willful violation of the school laws.

FINDINGS OF FACT

1. Appellant, Marjorie Brennan, was hired as a professional employee of the Berwick Area School District on August 1, 1967. Exhibit - Professional Employee Contract.

2. Ms. Brennan is certified to teach elementary school: kindergarten through sixth grade. N.T. 13, 14, 37.

3. Ms. Brennan taught the first grade at the Berwick Area School District for many years. N.T. 35.

4. The first grade classroom where Ms. Brennan taught was located on the first floor. N.T. 9, 38.

5. Beginning the 1978-79 school year, Ms. Brennan was assigned to teach the sixth grade. N.T. 3, 7, 35.

6. Ms. Brennan expressed concern about teaching the sixth grade and indicated that the children were going to suffer. N.T. 12, 37.

7. Ms. Brennan's sixth grade classroom was located on the second floor, which effectively meant she had to negotiate two stories because of the location of the office and cafeteria. N.T. 9, 38.

8. Although Ms. Brennan expressed to her principal her fear of falling down the stairs, she had no recollection at her hearing of having complained about difficulty climbing the stairs. N.T. 9, 38.

9. On October 10, 1978, Ms. Brennan said she wasn't feeling well and asked for a substitute for the next day. N.T. 4.

10. Ms. Brennan never returned to her teaching duties. N.T. 6.

11. On October 18, 1978, Principal Garrison sent Ms. Brennan a letter instructing her to submit a doctor's excuse to the office of Superintendent Cook. N.T. 5.

12. In response, Mr. Cook received a note from Dr. Thomas E. Patrick which stated in its entirety:

> Marjorie has been absent from teaching 10-11-78 because of severe pain in legs. Going to Geisinger Medical Center to Arthritis Clinic 10/26/78.

N.T. 15, Exhibit.

13. On December 6, 1978, Mr. Cook received a second note from Dr. Patrick reading:

> Margorie is being treated at GMC with reports sent to me Dr. Patrick. Diagnosis at GMC is bursitis in left leg. Next visit to GMC is to be 12/18/78. She may return to her work as soon as pain is relieved enough to resume full duties as teacher.

N.T. 16, Exhibit.

14. Mr. Cook wrote to Ms. Brennan on January 23, 1979, and February 7, 1979, asking for a doctor's excuse from Geisinger Medical Center. N.T. 16, Exhibits.

15. In response Mr. Cook received a letter from Dr. Dennis Torretti of Geisinger's Rheumatology Clinic, which letter was incorrectly dated January 5, 1979, but was actually sent February 6, 1979, as stipulated by the parties. N.T. 18, 22.

16. Dr. Torretti's letter states that Ms. Brennan was seen in the Rheumatology Clinic in October 1978 and once again on February 5, 1979. Dr. Torretti's diagnosis was that she was "extreme-

ly overweight" with "possible bursitis of the right knee," also some osteoarthritis in the right ankle related to an earlier fracture. N.T. 24, Exhibit.

17. Dr. Torretti's letter contains this conclusion:

> I have seen the patient on only these two occasions. In the interim she has been managed by her private physician. Her activities were not restricted initially. From a purely medical point of view, I think she is quite able to return to work at this time. It is conceivable that she might experience continued symptoms unless she is able to lose some weight.

N.T. 18, Exhibit.

18. After receipt of this report, Mr. Cook wrote to Ms. Brennan in February 9, 1979, stating:

> We have received a letter from Dr. Torretti, of the Geisinger Medical Center Staff, and he feels that you should return to work. Due to this response from Dr. Torretti, we would like to have a date when you expect to return to work.

N.T. 17, Exhibit.

19. Not having received any response to his letter of February 9, 1979, Mr. Cook wrote to Ms. Brennan again on February 26, 1979, ordering her to report for work on March 1, 1979, or face dismissal. N.T. 19, 20, Exhibit.

20. Ms. Brennan received all correspondence from Mr. Cook cited above. N.T. 49.

21. Ms. Brennan's daughter hand carried to Mr. Cook a letter from Ms. Brennan on February 28, 1979, disputing his reading of Dr. Torretti's letter and concluding:

> Until there is sufficient weight loss and the right ankle is sufficiently healed, it would be impossible for me to stand the pain.

N.T. 20, Exhibit.

22. Ms. Brennan did not report for work on March 1, 1979, or thereafter. N.T. 19, 49.

23. By letter of March 1, 1979, Superintendent Cook notified Ms. Brennan that her dismissal hearing was scheduled for March 13, 1979, stating:

> You will be charged with willful violation of the school laws of the Commonwealth in that you are illegally absent from your position and, by this action, have abandoned your teaching contract.

N.T. 20, Exhibit.

24. As of September 1978, Ms. Brennan had 126 1/2 accumulated sick days which included the 1978-79 school year. N.T. 14.

25. From October 11, 1978, through February 28, 1979, Ms. Brennan received her salary in the form of sick days, a total of 92 days. N.T. 21, 22.

26. Effective March 1, 1979, Superintendent Cook suspended Ms. Brennan without pay pending the outcome of her hearing. N.T. 22.

27. At Ms. Brennan's hearing on March 13, 1979, only three witnesses testified: Principal Garrison, Superintendent Cook and Ms. Brennan. No physician or psychologist was called to testify on Ms. Brennan's behalf. N.T. 1.

28. In addition to the physicians' letters quoted above, two others were introduced at the hearing. N.T. 41, 43.

29. Dr. T.C. Corson wrote:

> This is to verify that Marjorie Brennan was seen in my office on 3/7/79 with symptoms referable to menopause.

N.T. 43, Exhibit.

30. The other letter, dated March 7, 1979, was from Dr. Patrick. It states that he saw Ms. Brennan on October 20, 1978, at which time she complained of headache, a left sciatic type of pain, pains in her right ankle, and pain in her legs. He observed her to be upset and nervous, and prescribed a tranquilizer for her anxiety. Her next pertinent visit was March 6, 1979, at which time she was also very nervous, upset, and depressed, and

complained of terrible headaches. There is no mention of leg or ankle problems at this visit. The letter concludes:

> I sincerely believe that because of her somatic complaints, and because of her emotional problems, her value as a teacher at this immediate time would be questionable. It would seem to me that a leave of absence from work is indicated at this time. This would give her the opportunity to care for her problems, and return a healthier and better adjusted person.

N.T. 41, 42, Exhibit.

31. After the close of testimony at the hearing, Ms. Brennan's attorney submitted a letter to the School Board and Mr. Cook asking for a sabbatical leave of absence for health reasons for the 1979-1980 school year and to consider the remainder of the 1978-1979 school year as sick leave days. N.T. 52, Exhibit.

32. Ms. Brennan had not previously asked for sabbatical leave for either the 1978-1979 or the 1979-1980 school year. N.T. 43.

33. On March 21, 1979, the Board of Directors of the Berwick Area School District voted to dismiss Ms. Brennan, concluding:

> That the failure of Marjorie Brennan to report to her sixth grade teaching assignment at the Forteenth Street elementary building from March 1, 1979, to March 13, 1979, constitutes a persistent and willful violation of the school laws of

> this Commonwealth in that her absences from her teaching position and duties from March 1, 1979 to March 13, 1979, were without legal cause and were unexcused.

Decision of the Board, Conclusion of Law No. 4.

34. Ms. Brennan filed a timely appeal with the Secretary of Education essentially alleging that the facts did not support the dismissal and that the District acted unlawfully by failing to respond to her requests of March 13, 1979, for more sick leave and a sabbatical. Petition of Appeal, Statement of Grounds for Appeal.

35. As part of the appeal process, Ms. Brennan took the depositions by written interrogatories of both Dr. Patrick and Dr. Torretti.

36. In his deposition, Dr. Patrick stated that he is a specialist in family practice and that his examinations of Mrs. Brennan were primarily interrogatory. Deposition of Dr. Patrick, pp. 4 and 8.

37. Dr. Patrick also stated:

> Basically, her treatment for her arthritis and her leg pains was at the arthritic clinic at Geisinger, and I saw her because of her emotional problems and her depression and her tension headaches . . . Deposition of Dr. Patrick, p. 7.

38. Although Dr. Patrick offered his opinion on the effect of the second floor assignment on Ms. Brennan's leg pains (for which he wasn't treating her), at no time did he unequivocally state that she could not handle this assignment. Deposition of Dr. Patrick, p. 9.

39. In his deposition, Dr. Torretti stated that he is a sub-specialist in the area of rheumatology, and he reported an extensive physical examination of Ms. Brennan's leg problems. Deposition of Dr. Torretti, pp. 5 and 6.

40. Dr. Torretti, stated in his deposition:

> It is conceivable that the climbing of steps might cause some increase in symptoms with respect to her ankle pain, but on examination, mobility of the ankle was well maintained, and there was not any major restriction of motion present. The knee pain that she was experiencing appeared to be self-limited and should not represent a chronic problem that would permanently impair her function as a result of climbing up three flights of steps.

Deposition of Dr. Torretti, p. 9.

41. At no point in his deposition did Dr. Torretti offer the opinion that Ms. Brennan was unable to return to work. Deposition of Dr. Torretti, pp. 8-10.

DISCUSSION

This Appeal presents two issues:

A) Did the facts support Ms. Brennan's termination?

B) Did the Board act unlawfully by failing to respond to her requests of March 13, 1979, for more sick leave and a sabbatical?

In her brief and at oral argument on Appeal, Ms. Brennan attempted to raise a third issue:

C) Did the District err by ceasing payment of Ms. Brennan's salary prior to conclusion of a dismissal hearing?

A. Evidence of Persistent and Willful Violation of School Law

Section 1154 of the Public School Code of 1949, 24 P.S. §11-1154, provides for the payment of sick leave for teachers at the rate of ten days per school year and allows for the accumulation of unused sick leave. It further states:

> The board of school directors may require the employe to furnish a certificate from a physician or other practitioner certifying that said employe was unable to perform his or her duties during the period of absence for which compensation is required to be paid under this section.

It is abundantly clear that Ms. Brennan willfully and persistently failed to provide a disability certificate to the Board's agent, Superintendent Cook. Her regular physician wrote on October 26, 1978, and December 6, 1978, stating that she had leg problems for which she was being treated at Geisinger Medical Center. Quite reasonably, Superintendent Cook wrote to Ms. Brennan on January 23, 1979, asking for a certificate from Geisinger. He received no response to this request. He renewed his request in writing on February 7, 1979. In response, he received an unequivocal statement from Geisinger's Dr. Torretti stating:

> From a purely medical point of view, I think she is quite able to return to work at this time.

Mr. Cook then wrote to Ms. Brennan again, this time on February 9, 1979, telling her of Dr. Toretti's conclusion and asking when she would return to work. Not having recieved any reply to this letter by February 26, 1979, he wrote to her again on that date ordering her to return to work on March 1, 1979, or face dismissal. Although Ms. Brennan wrote back on February 28, 1979, stating her own opinion that she could not return to work, she did not submit any medical certificate to that effect.

When Ms. Brennan did not return to work on March 1, as ordered, Superintendent Cook suspended her sick leave pay and notified her of her termination hearing.

It is important to note what matters are and are not at issue here. The question is whether Ms. Brennan's absences from work from March 1 through March 13, 1979, were lawful. It is not material whether subsequent medical evidence might have supported her claim of illness; the School Code places on the teacher the obligation to provide medical certificates of ongoing disability.

Ms. Brennan simply failed to comply with her superintendent's lawful request for a disability certificate. Her continued absence from work after having been given over five weeks to produce such a certificate constitutes persistent and willful violation of the school laws of the Commonwealth.

Furthermore, as conceded by Ms. Brennan's counsel on appeal, the reasonable request of a superintendent may be viewed as school law for purposes of a persistent and willful charge. Brief on Appeal, p. 15. See Caffas v. Board of School Directors of Upper Dublin Area School District, 24 Pa. Commonwealth Ct. 578, 353 A.2d 898 (1976), Stroman v. Secretary of Education, 7 Pa. Commonwealth Ct. 418, 300 A.2d 286 (1973). Superintendent Cook made a reasonable request of Ms. Brennan to return to work after having given her ample opportunity to obtain a medical certificate, and she did not comply with that request from March 1-13, 1979.

Ms. Brennan argues that it was unreasonable for the Board to rely on the medical findings of Geisinger's Dr. Torretti because he had only seen her twice and Dr. Patrick was her regular physician. This is unpersuasive. Dr. Patrick's earlier certificates indicated that her continued absence was due to leg problems which were being treated at Geisinger. Accordingly, Geisinger was the best source of information about those problems. Because Dr. Torretti was the treating physician for the only problem that Dr. Patrick had certified, it was entirely appropriate for Mr. Cook to ask for and rely upon his opinion. Furthermore, in his letter of March 7, 1979, Dr. Patrick also reported only two pertinent visits by Ms. Brennan during the school year, one of which occurred after her notice of termination. As it turned out, Dr. Torretti had seen Ms. Brennan twice for this problem, whereas, as of February 1979, Dr. Patrick had only seen her once for it. Whereas Dr. Patrick's examination was "primarily interrogatory", Dr. Torretti reported an extensive examination. Also, Dr. Torretti is a sub-specialist in the area of rheumatology, whereas Dr. Patrick is in family practice.

Ms. Brennan argued at her hearing and on appeal that other medical problems--high blood pressure, depression and menopause--warranted her continued absence from work. These arguments are both irrelevant and unsupported. They are irrelevant because it is the teacher's duty to supply a requested medical certificate supporting her absence and this is what she failed to do in a timely fashion. A teacher cannot simply disregard the clear language in Section 1154 of the School Code requiring medical certification, disregard her superintendent's order to report to work, and then afterwards try to justify her absence.

These arguments are unsupported in that no physician clearly stated at any time that Ms. Brennan was unable to perform her duties during her period of absence, as mandated by Section 1154 for a medical excuse.

Accordingly, we find that Board's conclusion that Ms. Brennan was absent unlawfully from March 1 through March 13, 1979, is fully supported by all evidence.

B. Requests for More Sick Leave and Sabbatical

Ms. Brennan argues that the Board "acted unreasonably and in violation of the law by failing to respond to Petitioner's requests to use accumulated sick leave, to be granted an unpaid leave of absence or to take a sabbatical leave."

The argument for more sick leave or an unpaid leave of absence simply ignores the fact that the Board found that Ms. Brennan had not fulfilled her statutory obligation to provide medical certification of her need for sick leave. Thus, the Board's decision did effectively answer, and properly deny, the first two parts of her request.

As to her request for sabbatical leave, Ms. Brennan's attorney conceded at oral argument that, "There are several cases that indicate the Secretary does not have the authority to order sabbatical". N.T. Oral Argument, p. 18. This is indeed settled case law particularly where, as here, the School Board has not ruled on the issue. Commonwealth, Department of Education v. Oxford Area School District, 24 Pa. Commonwealth Ct. 421, 356 A.2d 857, 862 (1976).

C. Cessation of Sick Pay Pending Hearing

Ms. Brennan argued in her Brief on Appeal and at oral argument that it was unlawful to suspend her sick pay from March 1 (date of notice of hearing) to March 21 (date of Board's decision). Even the most liberal reading of her Petition for Appeal fails to reveal that that issue was raised therein. Nor is there any indication in the record that this issue was raised at the Board hearing.

The Department of Education's Teacher Tenure Hearing regulations require petitions of appeal to contain:

> (3) A statement of the issues presented (and)
> (4) The relief requested by the appellant.
> 22 Pa. Code §351.3(3) & (4)

Accordingly, this issue has not been properly raised on appeal.

Nevertheless, in the interest of administrative and judicial economy, we note that Ms. Brennan's position on this issue is not meritorious.

In support of her position, Ms. Brennan cites the unreported decision of the United States District Court for the Eastern District of Pennsylvania in Ashlie v. Chester-Upland School District, Civil Action No. 78-4037 (May 9, 1979), which held:

> After Skehan, the procedural due process rights of discharged teachers and professors require the protection of nothing less than a prior hearing. Therefore, to the extent that Pennsylvania Local Agency Law permits the dismissal of a public school teacher without benefit of a prior hearing, it is unconstitutional. It remains to determine, then what is to be done about it . . . Since Skehan compels a pre-termination hearing, plaintiff must be returned, as nearly as is practicable, to her status prior to dismissal. This means, at the minimum, reinstatement to a suspended status with back pay pending the outcome of the school board hearing. Slip Opinion at 4, 7.

Even had this issue been properly raised on appeal, we would find the Ashlie decision inapplicable for a number of reasons.

Ms. Ashlie had been prevented by her school district from returning to work; whereas Ms. Brennan refused to return to work and failed to procure a proper medical excuse for this refusal. Thus, the issue here is whether a teacher must receive sick leave without complying with the statutory requirement for receipt of it, not whether a teacher may be barred from working without pay pending a hearing. Since Section 1154 sets forth a specific requirement for obtaining sick leave, and since Ms. Brennan did not fulfill that requirement, she was entitled to no more sick leave.

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In addition, Ashlie is inapplicable because Ms. Ashlie was dismissed without a prior hearing of any sort; whereas Ms. Brennan was suspended prior to a full hearing on her dismissal.

For the foregoing reasons, we would have declined to apply the Ashlie rationale retroactively to March 1979 in this case, even were this issue properly raised.

Accordingly, we make the following:

ORDER

AND NOW, this 24 day of August, 1981, it is hereby Ordered and Decreed that the decision of the School Board of the Berwick Area School District dismissing Appellant be sustained on the ground of persistent and willful violation of the School Laws.

Robert G. Scanlon

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF EDUCATION

James P. Weaver, Jr., :
Appellant :

v. : Teacher Tenure Appeal No. 8-79

Uniontown Area School District, :
Appellee :

OPINION

James P. Weaver, Jr., Appellant herein, has appealed from the decision of the Board of Directors of the Uniontown Area School District, dismissing him as a professional employee on the ground of immorality.

FINDINGS OF FACT

1. Appellant, James P. Weaver, Jr., was hired by the Uniontown Area School District on September 3, 1968, and was a professional employee of that District teaching the fifth grade at the Menallen Elementary School at the time of the incidents in August 1978 leading to his suspension without pay in September 1978. Tr. 279, 280, 705, 706.

2. On September 5, 1978, Uniontown Area School District Superintendent Dr. Jay G. Elicker received a phone call from Menallen Elementary School Principal Nick Galie informing him that James P. Weaver, Jr., had been involved in an incident in late August 1978, at the Bon Ton Department Store in the Uniontown Mall which had led to Mr. Weaver's arrest. Tr. 280, 490.

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3. Principal Galie had heard of the "incident" on the eleven o'clock radio news. Subsequently he was visited by a State Trooper regarding it and read about it in the newspaper. Tr. 476, 490.

4. Prior to taking any action regarding appellant Weaver, Dr. Elicker received a call from a parent saying that she represented most of the mothers of the children in Mr. Weaver's class, and that they intended to withdraw their children unless some action were taken in the matter. Tr. 281-282.

5. Principal Galie received phone calls from four parents inquiring what he was going to do with Mr. Weaver. One stated that, if something wasn't done, they were going to take their kids out of Mr. Weaver's room. All four calls were received after Mr. Weaver was suspended. Tr. 476, 477, 479, 492-493.

6. Superintendent Elicker conducted an investigation which consisted of:

(a) Speaking to the manager of the Bon Ton Department Store; Tr. 454, 456;

(b) Speaking to a security guard; Tr. 455;

(c) Speaking to the State Police; Tr. 456;

(d) Speaking by telephone with District Magistrate Parker; Tr. 456; and

(e) On September 11, 1978, meeting with James Weaver, Jr., his attorney, James Weaver, Sr., and two PSEA representatives; Tr. 280, 281.

7. At the meeting held September 11, 1978, appellant Weaver acknowledged that he had been present at the site of the alleged incident, that he received a summons and a fine was paid. Tr. 292.

8. On September 12, 1978, Superintendent Elicker sent Appellant Weaver a letter, Teacher's Exhibit D, telling him not to report to work until further notice pending the results of the investigation of the incident at the Bon Ton Department Store. Tr. 287-288.

9. On September 14, 1978, Superintendent Elicker sent Mr. Weaver a letter, Teacher's Exhibit E, telling him that he would recommend Mr. Weaver's termination to the Board of School Directors and that Mr. Weaver was suspended without pay from the date he was initially informed not to report to work, pending further action by the Board. Tr. 288.

10. Superintendent Elicker's decision to suspend Mr. Weaver without pay was made on the advice of counsel, Mr. Herbert Margolis. Tr. 289, 292, 454.

11. Superintendent Elicker contacted Mr. Margolis by telephone on September 5, 1978, to find out whether the School Code would allow him to suspend Mr. Weaver after his arrest and payment of a fine for disorderly conduct. This was the extent of Mr. Margolis' advice to Dr. Elicker on the matter prior to the termination hearing. Tr. 463, 460, 454.

12. At Mr. Weaver's hearing, Mr. Margolis sat with the Board and frequently acted as chairperson and ruled on procedural matters.

13. At Mr. Weaver's hearing, the administration's case was presented by attorney William M. Radcliffe, hired by the Board for this purpose pursuant to a motion made on September 18, 1978. Minutes of School Board, September 18, 1978.

14. Although Mr. Margolis offered to testify as to the extent of his prior conversations with Superintendent Elicker, Mr. Weaver's attorney did not call him to testify. Tr. 471.

15. By letter dated September 19, 1978, the Uniontown Area School District formally advised Mr. Weaver of the Board's resolution of September 18, 1978, to the effect that he had been engaged in immoral conduct, proposing that his contract be terminated, and setting a hearing date for October 3, 1978. The letter quoted the following statement of charges:

> 1. On or about Friday, August 25, 1978, in and about the Bon Ton Department Store in the Uniontown Mall, a public place, you acted in a peculiar and immoral manner toward a female employe of that establishment in that you unduly followed her around the store while she was performing her duties, and that, at various intervals, you made rude and obscene gestures with your hand at or near your genitals.
>
> 2. On or about Saturday, August 26, 1978, in and about the Bon Ton Department Store in the Uniontown Mall, a public place, you acted in a peculiar and immoral manner toward a female employe of that establishment in that you unduly followed her around the store while she was performing her duties, and that, at various intervals, you made rude and obscene gestures with your hand at or near your genitals and laid down on the floor and proceeded to look up her dress.
>
> 3. On both occasions recited aforesaid, your behavior and actions were observed by the public, seriously reflecting upon your moral fitness to instruct students in the Uniontown Area School District. Administration Exhibit No. 2.

16. After a continuance requested by Mr. Weaver's attorney, the termination hearing commenced on October 23, 1978. Tr. 17.

17. When the hearing commenced on October 23, 1978, the administration's attorney, Mr. Radcliffe, moved that the dates in the Board resolution and letter be amended from Friday and Saturday, August 25 and 26, 1978, to Thursday and Friday, August 24 and 25, 1978. Tr. 8.

18. Mr. Weaver's attorney at this stage of the hearing, Ronald Watzman, moved for a continuance so that he could prepare a defense based on the revised dates. Tr. 9-10.

19. Mr. Watzman's motion to continue was denied on the basis that the September 19th letter indicated that the charges occurred "on or about" the dates specified. Tr. 11-12.

20. The motion to amend the date of the charges was granted. Tr. 13.

21. The Weaver hearing included six days of testimony (October 23, 1978, November 21, 1978, November 27, 1978, January 8, 1979, January 9, 1979, and January 10, 1979), a view of the Bon Ton Department Store on January 10, 1979, and unrecorded oral argument by counsel on April 16, 1979. Brief in Behalf of Uniontown Area School District, p. 6.

22. Testimony at the hearing focused on Mr. Weaver's activities on Thursday, August 24, 1978, and Friday, August 25, 1978.

23. Substantial, credible, unbiased eye-witness testimony by a security guard indicates and the Secretary of Education hereby finds that on the evening of Thursday, August 24, 1978, Mr. Weaver, in a public place, the Bon Ton Department Store of the Uniontown Mall:

(1) rubbed his forearm and hand on the front of his body in the area of his private parts, having an erection in the process; Tr. 27, 28, 71, 73;

(2) continually watched a female clerk while playing with himself; Tr. 28, 29, 55;

(3) gyrated by moving his butt backwards and forwards; Tr. 29, 59, 60, 62, and

(4) then was chased out of the store to the parking lot where he drove away in a yellow Mustang. Tr. 34-35.

24. On August 24, 1978, Mr. Weaver was driving his wife's yellow Ford Mustang. Tr. 721.

25. Substantial, credible, unbiased testimony by another security guard and a salesgirl indicates and the Secretary of Education hereby finds that on the afternoon of Friday, August 25, 1978, Mr. Weaver returned to the Bon Ton Department Store, Tr. 152, 303, where he:

(1) crossed his legs and placed his forearms in the area of his genitals, Tr. 216, 217;

(2) rocked up and down from his heels to the balls of his feet while he rubbed his genitals against a display table, Tr. 163, 164, 247, 311, 316, 318, 321, and 397;

(3) got down on his hands and knees, Tr. 166, 167, 253, 325, 406;

(4) rubbed himself with both of his hands just below the fly area of his pants, Tr. 310, 387; and

(5) lay flat on the floor, stomach down, while looking up the dress of the salesgirl. Tr. 328, 414, 420-423, 426 and 427.

26. The salesgirl was scared and offended by Mr. Weaver's behavior. Tr. 320, 409.

27. On August 29, 1978, a non-traffic citation against James P. Weaver, Jr., was filed in the office of District Magistrate Harold

Parker by a State Police Trooper. The charge was disorderly conduct. The "nature of offense" reads:

> Actor followed Becky S. Blair around the Bon Ton Department Store staring at her, rubbing his private area and two times laid on the floor and looked up her dress. Tr. 116 and Administrative Exhibit No. 3.

28. Sherrie Weaver, wife of appellant, signed for the citation on August 30, 1978. Tr. 865, 866.

29. Appellant Weaver read the citation when he came home the evening of August 30, 1978. Tr. 865.

30. James P. Weaver, Sr., father of appellant, paid his son's fine for the disorderly conduct charges of $100 plus $26 in costs. Tr. 117.

31. Various Board members were absent during different parts of the hearing, but all read the transcripts of the parts they did not hear. Tr. 1006-1012.

32. Although Mr. Radcliffe submitted requested findings of fact and conclusions of law to the Board by letter dated April 11, 1979, none were ever adopted by the Board.

33. Rather, the Board met on April 16, 1979, and took two roll call votes, as follows:

> (1) "Have the charges or complaints against James P. Weaver, Jr., been sustained, and does the evidence substantiate such charges and complaints?" The vote was seven yeas, one nay and one absent.
>
> (2) "Director Joseph Giachetti moved that the professional employee contract between James P. Weaver, Jr., and the Uniontown Area School District be

terminated, that he be dismissed as a professional employee of the Uniontown Area School District, and that this suspension by the Superintendent of the Uniontown Area School District, without pay, effective September 12, 1978, be and the same is hereby confirmed." The vote was six yeas, two nays and one absent. Letter of School Board to Mr. Weaver, April 18, 1979.

34. Mr. Weaver was formally notified of the Board's actions by letter dated April 18, 1979. Letter of School Board to Weaver, April 18, 1979.

DISCUSSION

This Appeal presents four issues:

> Did the admission of the disorderly conduct plea render the decision of the school board unlawful and lacking in substantial evidence to support the discharge?
>
> Was Appellant's suspension without pay by the Superintendent supported by substantial evidence and proper under the School Code?
>
> Was the Appellant denied due process of law by virtue of the Administration's late amendment of the charges filed against him and by virtue of the post-suspension proceedings?
>
> If the credibility findings of a Board are immune from challenge on appeal, does the failure of all school board members to attend each hearing mandate that an independent review of the case be undertaken by the Secretary and, if so, does substantial evidence exist to sustain the charges?

A. Admission of the Disorderly Conduct Plea

Appellant Weaver argues that evidence of his disorderly conduct citation and payment of his fine by his father was inadmissible and that without its admission the Board lacked substantial evidence to terminate him for immoral conduct. Appellant further argues that because his father paid the fine, the conviction is irregular and should not have been introduced.

None of these contentions is meritorious. Appellant cites no authority that evidence of the citation and payment of fine are excludable. The Commonwealth Court was ruled that a nolo contendere plea is competent evidence in a teacher tenure hearing on the issue of immorality, Baker v. School District of the City of Allentown, 29 Pa. Commonwealth Ct. 453, 371 A.2d 1028 (1977). Thus, even if one analogizes the father's payment of the fine to a nolo contendere plea, as does appellant, it is admissable. Furthermore, a teacher tenure hearing and appeal are hardly the proper forums to challenge the validity of a disorderly conduct conviction.

Appellant is correct in noting the difficulty of not having findings of fact and conclusions of law adopted by the school district. However, it is clear that there was substantial evidence presented of his immoral conduct to support his dismissal, even without reliance on the citation. The citation related only to Friday, August 25, 1978. As to Appellant's behavior in the Bon Ton on that day, there were 144 transcript pages of testimony by an eyewitness security guard and 132 transcript pages of testimony by the salesgirl who was the object/victim of that behavior. Although Appellant denies that his behavior in the Bon Ton Department

Store that day was in any way abnormal, the School Board clearly had substantial credible evidence - without reference to the disorderly conduct citation - on which to rely for its decision.

Furthermore, substantial and credible evidence was adduced as to his immoral behavior at the store on Thursday, August 24, 1978. Appellant attempted to establish that he was elsewhere. However, the unbiased eyewitness account of the security guard who observed the behavior, chased its perpetrator to a yellow Mustang and subsequently identified Mr. Weaver at the hearing, constitutes credible and substantial evidence that Mr. Weaver was the person who engaged in the immoral conduct.

The School Board voted to dismiss Appellant for immorality under Section 1122 of The Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1122. In this context, the courts have consistently defined immorality as "a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate." Penn-Delco School District v. Urso, 33 Pa. Commonwealth Ct. 501, 510, 382 A.2d 162, 167 (1978). Appellant alleges that the School District's decision lacked substantial evidence because the District produced no witnesses stating that Mr. Weaver's conduct offended the morals of the community and no testimony that he had entered upon a course of conduct. These contentions are unsupportable both legally and factually.

In Penn-Delco School District v. Urso, the Commonwealth Court held that a finding of immorality will not be disturbed if "a reasonable man acting reasonably might have reached the same decision reached by the Board." Pa. Commonwealth Ct. at 511, A.2d at 167. Indeed Appellant's brief on appeal cites ten administrative and judicial decisions on teacher tenure appeals where evidence of contemporary moral standards was not required. His attempt to distinguish this clear line of cases is unpersuasive.

Additionally, there was specific evidence adduced at the hearing on this issue. Both the school principal and the district superintendent received phone calls from parents inquiring as to what would be done with Appellant, and, in two cases, threatening to remove children from his class if he were not removed. Also, the salesgirl who was the object/victim of Appellant's behavior testified that she was scared and offended by it.

Finally, despite Appellant's assertion to the contrary, the School Board did indeed hear substantial evidence that Mr. Weaver had entered upon an immoral course of conduct, not on one, but one two separate occasions, August 24 and 25, 1978.

In sum, even without whatever probative value was attached to evidence of the disorderly conduct citation, the School Board's decision is supported by the evidence and cannot be overturned. (See Section D below for a discussion of the criteria for review of the evidence.)

B. Appellant's Suspension Without Pay

The Supreme Court of Pennsylvania has explicitly held that a tenured teacher may be suspended without pay pending a hearing on dismissal for immoral conduct. Kaplan v. School District of Philadelphia, 388 Pa. 213, 130 A.2d 672 (1957). The Court held that a superintendent has not only the right, but the duty to suspend a teacher without pay if he thinks that the welfare of the students in a teacher's class would suffer from his continued tutorship. Id. at 219. Superintendent Elicker after the actions summarized in Findings of Fact Nos. 2, 3 and 6, surely had sufficient grounds to be concerned for the welfare of Mr. Weaver's students to warrant his removal from the classroom.

In reliance upon the Kaplan case, past teacher tenure appeal decisions have upheld the right of a superintendent to suspend a teacher without pay pending a hearing. Cf. Pawlowski v. Steel Valley Area School District, T.T.A. No. 224, Brendlinger v. Philadelphia School District, T.T.A. No. 266.

Nevertheless, Appellant cites the recent decision of the United States District Court for the Eastern District of Pennsylvania in Ashlie v. Chester-Upland School District, Civil Action No. 78-4037 (May 9, 1979), to challenge his suspension without pay. The Ashlie decision holds, in relevant part:

> After Skehan, the procedural due process rights of discharged teachers and professors require the protection of nothing less than a prior hearing. Therefore, to the extent that Pennsylvania Local Agency Law permits the dismissal of a public school teacher without benefit of a prior hearing, it is unconstitutional. It remains to determine, then what is to be done about it.... Since Skehan compels a pre-termination hearing, plaintiff must be returned, as nearly as is practicable, to her status prior to dismissal. This means, at the minimum, reinstatement to a suspended status with back pay pending the outcome of the school board hearing. Slip Opinion at 4, 7.

It is unnecessary in the context of this appeal to determine the continued validity of Kaplan after Ashlie. The Ashlie case is distinguishable for several reasons:

(a) Ms. Ashlie was dismissed without a prior hearing of any sort, whereas Mr. Weaver was suspended prior to a full hearing on his dismissal.

(b) Whereas Ms. Ashlie was given no opportunity whatsoever to be heard before her removal without pay, Mr. Weaver was confronted with the allegations by Superintendent Elicker at a meeting on September 11, 1978, prior to his dismissal and given the opportunity to be heard.

(c) The court in Ashlie found that there had been ample opportunity (several weeks) between the time of Ashlie's alleged immoral conduct and her removal from teaching duties in "which time a hearing could have been conveniently held." In the instant case, Superintendent Elicker first heard of the charges against Mr. Weaver on September 5, 1978, and removed him from the classroom on September 12, 1978, insufficient time for a full hearing.

In light of these significant distinctions, there appears to be no legal reason to apply the Ashlie rationale retroactively to Mr. Weaver's suspension without pay in the instant case.

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C. Due Process Implications of Amendment of Date in the Charges and Post-Suspension Proceedings

Appellant Weaver next argues that he was denied due process of law by virtue of the amendment on October 23, 1978, of the dates set forth in the charges against him, the fact that his formal hearing was held after he was suspended, and that Mr. Margolis advised the Board and ruled on objections after he had advised Superintendent Elicker that he could suspend Mr. Weaver.

The issue of the due process implications of a post-suspension hearing is a mere restatement of Mr. Weaver's second argument which was addressed in the preceding section of this opinion.

As regards the amendment of the charges on October 23, 1978, against Mr. Weaver, he argues that this constituted a violation of both Section 1127 of the School Code and due process. These arguments are unpersuasive. The courts have not required the same specificity of Section 1127 notices as criminal indictments. Cf. Lucciola v. Secretary of Education, 25 Pa. Commonwealth Ct. 419, 360 A.2d 310, 312 (1976). The original, unamended notice to Mr. Weaver, quoted in Finding of Fact No. 15, sets forth the actions and the site of those actions for which Mr. Weaver was ultimately terminated. It recited that they took place "on or about Friday, August 25, 1978." These dates were later amended to August 24 and 25.

As came out at the hearing, the conduct of Friday, August 25, was the more serious and led to the disorderly conduct charge against Mr. Weaver. In a similar situation, the Commonwealth Court has upheld a dismissal where the notice, as here, was correct in part as to dates.

Wissahickon School District v. McKown, ___ Pa. Commonwealth Ct. ___, 400 A.2d 899, 901 (1979).

Inasmuch as the hearing continued for three months encompassing a total of six days of testimony, it is impossible to understand how this slight amendment prevented Mr. Weaver from adequately presenting a defense to the charges.

Similarly we can find no due process violation in Mr. Margolis' advising the Board during this hearing. During the hearing, the administration's case was presented by another attorney, Mr. Radcliffe, specially hired for the job. The only evidence of prior involvement of Mr. Margolis is that he advised Superintendent Elicker that he could suspend Mr. Weaver without pay prior to a hearing on his termination. Although Mr. Weaver asserts that there was further involvement by Mr. Margolis, there is no evidence to support this assertion, and Mr. Weaver declined Mr. Margolis' offer to testify on the subject. Appellant Weaver has failed to overcome the presumption of regularity that attaches to administrative proceedings.

Indeed, Mr. Margolis' prior involvement was not only slight, but probably can best be characterized as adjudicatory rather than prosecutorial, as he advised a decision maker as to the legality of a proposed step in Mr. Weaver's termination. It is clear that the knowledge gained by Mr. Margolis did not render him unfit to advise the Board member may have some prior knowledge of the facts on which the charges were based. Penn-Delco School District v. Urso, 33 Pa. Commonwealth Ct. 501, 514, 382 A.2d 162, 168 (1979).

D. Credibility of Witnesses Not Heard By All School Board Members Nor the Secretary of Education

Finally Mr. Weaver argues that, particularly in the absence of findings of fact by the Board, it is inappropriate to allow the Board's presumed judgment of the credibility of witnesses to be immune from attack. Since several Board members were absent during parts of the hearing and had to rely upon a reading of the transcript of those facts, he argues that the Secretary "has broad latitude in determining whether or not substantial evidence existed to sustain the charges."

Although these contentions raise an admittedly puzzling area of the law, we cannot agree that Mr. Weaver's dismissal should be overturned.

As Mr. Weaver acknowledges, not all Board members need be present during the entire hearing. Boehm v. School District of Pittsburgh, 30 Pa. Commonwealth Ct. 468, 472-3, 373 A.2d 1372, 1375 (1977). It is also clear that a Board need not adopt formal findings of fact. Penn-Delco School District v. Urso, 33 Pa. Commonwealth Ct. 501, 513, 382 A.2d 162, 168 (1978).

Here the clarity ends. In Penn-Delco, in the absence of formal findings of fact by the Board, the Commonwealth Court stated:

> A finding of the school board that a professional employee was guilty of offending the moral standards of the community by his actions will not be disturbed on appeal when supported by substantial evidence. Baker v. School District of City of Allentown, 29 Pa. Cmwlth. 453, 371 A.2d 1028 (1977). Such substantial evidence necessary to justify dismissal is determined by whether a reasonable man acting reasonably might have reached the same decision reached by the Board. Landi v. West Chester Area School District, 23 Pa.Cmwlth. 586, 353 A.2d 895 (1976). It is apparent in

> view of the entire record that the Board chose to accept the testimony of the two students as to what was said to them rather than Respondent's version. The Board, as the only fact finder with respect to these two incidents, and the only tribunal having the only opportunity to hear first-hand the testimony of both students and Respondent, resolved the issue of credibility against Respondent. A.2d at 167. (Emphasis Added.)

Similarly, in Wissahickon School District v. McKown, ___ Pa. Commonwealth Ct. ___, 400 A.2d 899 (1979), the Commonwealth Court admonished the Secretary of Education not to substitute her judgment as to the credibility of witnesses for the Board's:

> We do not believe, however, that it was within the Secretary's power to substitute her judgment regarding the credibility of this witness for that of the Board. A.2d at 900.

Yet, in Grant v. Board of School Directors of the Centennial School District, ___ Pa. Commonwealth Ct. ___, 403 A.2d 157 (1979), the Commonwealth Court held:

> The provision in sum establishes the Secretary of Education as the ultimate fact finder in cases of this nature and with this status goes the power to determine the credibility of witnesses, the weight of their testimony and the inferences to be drawn therefrom. A. 2d at 159.

Hence it is not clear whether the Secretary on appeal must sustain a dismissal for immorality if supported by substantial evidence relying on the Board's judgment of the credibility of witnesses (Penn-Delco), or become the fact finder and judge of credibility, (Grant).

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However, using either standard of review, we hold that the determination of the School Board must stand.

The situation here is akin to that in Penn-Delco. Although there were no formal findings of fact by the Board, it did vote that the charges and complaints against Mr. Weaver were sustained and that the evidence substantiated them. Those charges and complaints, in turn, are quite specific. (See Finding of Fact No. 15). It is apparent in view of the entire record that the Board chose to believe the security guards and salesgirl who testified as to Appellant Weaver's immoral conduct, rather than respondent and his alibi witnesses. The security guards and the salesgirl unquestionably presented substantial evidence of Mr. Weaver's immoral conduct. (See Section A of this Opinion).

Furthermore, in light of a review of the entire transcript of the proceedings, the Secretary of Education must agree with the Board that the testimony of the security guards and salesgirl is more credible than that of Mr. Weaver and his alibi witnesses. The specificity with which Mr. Weaver and his alibi witnesses remembered the exact times of his comings and goings on relevant days defies credulity. His assertion that he was not the man at the Bon Ton Store on August 24, 1978, is similarly difficult to believe in the face of his identification by an unbiased eyewitness and the fact that he and this man were both driving a yellow Mustang that day. Mr. Weaver has propounded no reason why the security guard and salesgirl would lie about his actions on Friday, August 25, 1978; nor explained how or why his disorderly conduct citation got from him to his father, who paid it. Given three, detailed eyewitness accounts of Mr. Weaver's conduct from persons with no apparent reason to fabricate, the weight of credible testimony supports Mr. Weaver's dismissal.

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Accordingly, we make the following:

ORDER

AND NOW, this 27th day of December, 1979, it is hereby Ordered and Decreed that the decision of the School Board of Uniontown Area School District dismissing Appellant be sustained on the ground of immorality.

Robert G. Scanlon

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

BETTE T. KRALL, Appellant	:	
	:	Teacher Tenure Appeal
v.	:	No. 9-79
	:	
BETHEL PARK SCHOOL DISTRICT, Appellee	:	

Bette T. Krall, Appellant herein, has appealed from the decision of the Board of School Directors of the Bethel Park School District dismissing her as a professional employee on the grounds of immorality and persistent and willful violation of the school laws.

FINDINGS OF FACT

1. The Appellant, Bette T. Krall, is a professional employee of the Bethel Park School District, having been employed by the district since 1969 (N.T. p. 4).

2. At the time of the hearing before the school board, the Appellant was also a school director in South Park Township School District (N.T. p. 4).

3. On February 12, 1979, the Appellant notified the secretary to the principal of the Park Avenue School in Bethel Park School District that she would not be present for her duties on February 14 and 15, 1979 (N.T. p. 5).

4. On February 14 and 15, 1979, the Appellant attended a school director's conference in New Orleans, Louisiana as a representative of the South Park School Distrct (N.T. pp. 4-5).

5. On February 19, 1979, the Appellant submitted a report of excused absence for February 14 and 15, 1979 giving sickness as the reason for the absence (N.T. p. 5).

6. On February 26, 1979, the Appellant submitted a written report from Dr. Glenn Rankin stating that the Appellant was ill on February 14 and 15, 1979 (N.T. p. 5).

7. The report prepared by Dr. Rankin was based upon information supplied to him by the Appellant's husband and not upon an examination of the Appellant (N.T. p. 5).

8. Subsequent to the submission of his report, Dr. Rankin contacted the school district and retracted his report. (N.T. p. 5).

9. The school district refused to accept the absence for the days of February 14 and 15, 1979 and denied payment of the salary for those days to the Appellant. The district considered the absences for the two days to be unexcused absences (N.T. p. 5).

10. In 1977, the Appellant had applied for personal days to attend a school convention in California, which request was denied by the school district. The Appellant did not attend that convention (N.T. p. 9).

11. The Appellant requested sick leave days for February 14 and 15, 1979 because she assumed that a request for the use of personal days would again be denied (N.T. pp. 9-10).

12. According to the Appellant, and not denied by the School District, she has accumulated sixty-five sick leave days, four personal days and four personal days credited to her retirement (N.T. p. 10).

13. The Appellant was suffering from a chronic sinus condition with headaches, earaches and eye pain for most of the 1978-1979 school term (N.T. p. 10).

14. The Appellant requested a doctor's excuse for her absence on February 14 and 15, 1979 because of her ailments (N.T. p. 10).

15. By letter dated March 12, 1979, the school board notified the Appellant of her proposed dismissal as a professional employee on the grounds of immorality and persistent and willful violation of the school laws.

16. A hearing before the school board was held on March 27, 1979. On April 10, 1979, the school board voted to dismiss the Appellant as a professional employee.

17. By letter dated May 7, 1979, the Appellant appealed her dismissal to the Secretary of Education.

18. By letter dated May 22, 1979, the Appellant filed a Notice of Intention to Offer Additional Testimony with the Secretary of Education. In her Notice, the Appellant sought to offer the testimony of all members of the Board of School Directors of the Bethel Park School District; the testimony of the school superintendent of the school district; and the testimony of a teacher in the school district.

19. On June 1, 1979 the request made by Appellant to take additional testimony was denied by the Department of Education. On June 24, 1979, the Appellant submitted an affidavit in further support of the taking of additional testimony of one of the witnesses listed on the request previously denied by the Department of Education.

20. A hearing was held on October 3, 1979 before a hearing officer appointed by the Secretary of Education.

DISCUSSION

A. Immorality

In its statement of charges dated March 12, 1979, the school district listed the following three events to support the charges of immorality and

and persistent and willful violation of the school laws: (1) Appellant's unauthorized absence from the classroom on February 14 and 15, 1979; (2) the Appellant's submission of a false report of excused absence for February 14 and 15, 1979; and (3) the submission of a false and fraudulently procured physicians excuse for the Appellant's absences on February 14 and 15, 1979.

The first charge made by the district, which is the unauthorized two day absence of the Appellant from her duties cannot, as a matter of law, provide the basis for a finding of immorality. Immorality has been defined as "...a cours of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate". Horosko v. Mount Pleasant School District, 335 Pa. 369, 372, 6 A.2d 866, 868 (1939). The failure to report to the classroom on two days, in and of itself, cannot be said to offend the morals of the community and provide a bad example for the Appellant's students.

The remaining two charges deal with the Appellant's submission of a false report of excused absence and her procurement of a false doctor's excuse. In many respects the present case poses the same questions decided in the case of Appeal of Barton Howe III, Teacher Tenure Appeal No. 296. In that case, the Appellant submitted an absentee slip listing illness as the reason for his inability to work on two days. In fact, the teacher was working in a department store on the two days in question. In reversing the teacher's dismissal on the basis of immorality, we concluded as follows:

> We believe that the Board has acted in a manner unreasonably harsh in view of the circumstances. In view of the fact that the Appellant was an eight year veteran with a record previously above reproach, we

> find the charges as to immorality excessive and an abuse of Board discretion. A single act of lying is not so inimical to the welfare of the school community that it would necessarily affect the student-teacher relationship. In this case there has been no clear nexus established between the teacher's act of lying and the Appellant's fitness to teach. Therefore, we reverse the dismissal on the charges of immorality.

On appeal, the Commonwealth Court reversed the decision of the Secretary because of the Secretary's improper re-evaluation of the credibility of witnesses. Board of School Directors of Riverside Beaver School District v. Barton Howe, III, 389 A.2d 1214, 37 Pa. Commw. Ct. 241 (1978). The teacher in the Howe case argued on appeal that the Secretary had concluded as a matter of law that the teacher's conduct did not amount to immorality. However, the court dismissed the teacher's argument because the Secretary's opinion did not explicitly state that the conduct did not amount to immorality as a matter of law.

In this opinion we conclude that the teacher's conduct did not amount to immorality as a matter of law. In reaching this determination, we have not re-evaluated the credibility of the witnesses but have accepted the stipulated facts read into the record of the hearing below. In the present case, the Appellant had accumulated 65 sick leave days, four personal days and four personal days credited to her retirement. There is no evidence in the record that the Appellant abused her sick leave and personal leave privileges. Indeed, the number of accumulated sick leave and personal leave days leads to an inference that the Appellant did not have a history of absenteeism.

In reversing the school board's finding of immorality, we are not condoning the conduct of the Appellant. We feel, however, that the conduct of the Appellant merited a less severe form of punishment. A dismissal on the basis of immorality carries with it a stigma which the Appellant will bear throughout her professional career. We do not feel that the conduct of the Appellant amounted to immorality as that term has been defined by the courts. Accordingly, we reverse the finding of immorality made by the school board in this case.

B. Persisent and Willful Violation of School Laws

At the hearing held on this appeal before a hearing examiner appointed by the Secretary of Education, the solicitor for the school district stated that the findings of the board concerning the dismissal of the Appellant were based purely upon the charge of immorality. In addition, the solicitor stated that after the submission of the testimony and consideration of the stipulated facts, it was determined that there was no basis for the charge of persistent and willful violation of the school laws. (N.T. 12, Record of Hearing on Appeal).

Although the attorney's statements above appear on the record in the appeal and bind the school board, the dismissal of the persistent and willful violation of the school laws charge does not appear in the record of the school board hearing submitted to the Secretary of Education. In the future we would advise school boards that their minutes in personnel actions should clearly state the statutory charge upon which their final vote is based.

Because the board's attorney has clearly stated the charge of persistent and willful violation was not supported by the board, it is not legally necessary for the Secretary to address it in this opinion. However, to provide guidance for future cases we will discuss this charge and the evidence presented in support of it. In Lucciola v. Commonwealth of Pennsylvania, Secretary of Education, 360 A.2d 310 (1976) the court upheld the dismissal of a teacher who applied for the use of two days of sick leave because of illness and three days of personal leave to transact business during a period of time when the teacher was on a skiing vacation with a student. The court concluded that the word "persistent" can be defined as one act carried on for a substantial period of time or a series of individual acts.

In the present case, two of the events supporting the charge of persistent and willful violation of the school laws occurred on only one occasion. These events were the submission of a false report of excused absence and the submission of a false physician's excuse. Because they occurred on only one occasion, these events cannot support a charge of persistent and willful violation of the school laws.

The third event listed by the board to supports it charge of persistent and willful violation of the school laws was the Appellant's absence from school of February 14 and 15, 1979. We do not feel that the Appellant's absence from school on these dates amounted to persistent and willful violation of the school laws. Prior to her absence from school, the Appellant notified the school district that she would not be present for her teaching duties on February 14 and 15. There is no evidence that the school district ever informed the Appellant prior to February 14 that she could not be absent on the days in question. Upon her return, the Appellant applied for the use of sick days instead of available personal leave days because her request to use personal leave days to attend a convention was denied by the district in the previous year. Anticipating that the school district would again reject her use of personal leave days, the Appellant chose instead to apply for the use of sick days.

In order to sustain a charge of persistent and willful violation of the school laws, a school district must show that a teacher's conduct exhibited both persistency and willfulness. In this case we do not see any evidence of willfulness. Before she left for New Orleans, the Appellant duly notified the district that she would not be present for her teaching duties on Feburary 14 and 15. She was never told in advance of her departure that she was not allowed to be absent on the days in question. Under such circumstances, we conclude that the Appellant did not willfully violate the school laws.

Accordingly, we make the following:

ORDER

AND NOW, this 30th day of November, 1981, it is hereby ordered that the appeal of Bette T. Krall is sustained and that the board of school directors of the Bethel Park School District reinstate her without loss of pay to her position.

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

RUSSELL C. THOMAS, Appellant	:	
v.	:	Teacher Tenure Appeal No. 10-79
BOARD OF DIRECTORS, POTTSTOWN SCHOOL DISTRICT, Appellee	:	

OPINION

Russell C. Thomas, Appellant herein, has appealed from a decision of Pottstown School District demoting him as a professional employee.

FINDINGS OF FACT

1. Russell Thomas, Appellant herein, is a professional employee of the Pottstown School District and has been continually employed by said school district as a full-time teacher for nine (9) years.

2. During the 1977-78 and 1978-79 school years, Appellant was one of 11 employees on the physical education teaching staff.

3. As of September 5, 1978, the beginning of the 1978-79 school year, Appellant had completed nine full years of service with the district, having greater seniority than six other employees on the physical education staff.

4. For the prior 1977-78 school year, the Appellant was ranked lowest among all 11 employees on the physical education staff, in terms of efficiency and seniority weighted efficiency ratings.

5. During the past 11 school years, 1968-69 through 1978-79, the district has experienced a decline in student enrollment of 1,403 or 27.5 percent.

6. As a result of the decline and expected further decline in student enrollment and the effect thereof on the number of physical education classes to be taught in the 1979-80 school year, the district superintendent determined and recommended to the Board of School Directors that a reduction of one full-time physical education teaching position to half-time status with a proportionate salary reduction was warranted for the 1979-80 year.

7. The superintendent recommended that the above reduction be accomplished by comparing efficiency ratings, seniority-weighted efficiency ratings, and relative seniority positions of all physical education employees, utilizing the ratings and seniorities for 1977-78 school year.

8. On the basis of Appellant's low ranking, in terms of the above ratings, the superintendent recommended to the Board that the physical education teaching of Appellant be the one reduced to half-time status with a proportionate decrease in salary for the 1979-80 school year.

9. At the same meeting of May 9, 1979, the Board scheduled a hearing on May 24, 1979, in the event the Appellant did not consent to the reduction.

10. Appellant was notified of the hearing by letter dated May 14 1979 and personal service by the district superintendent.

11. Appellant refused to consent to the reduction and a public hearing was held on May 24, 1979, as scheduled, before the Board.

12. At the conclusion of the hearing, the Board, after hearing the evidence presented, reduced Appellant in position and salary by 50 percent, effective September 4, 1979, on the basis of the decline and expected decline in student enrollment, the effect thereof on the number of physical education teachers required for the school year, and on Appellant's low ranking in terms of the ratings used for all employees of the physical education staff for the year 1977-78.

13. At a special meeting on June 4, 1979, the Board formally decided to reduce Appellant in position and salary by 50 percent for the 1979-80 school year.

14. By letter of June 4, 1979, sent by certified mail, Appellant was notified of the above action.

15. On or about June 14, 1979, subsequent to the decision of the Board to reduce Appellant, efficiency ratings of the Appellant for the 1978-79 school year became available.

16. On or about June 28, 1979, Appellant filed a Petition of Appeal with the Secretary of Education of the Commonwealth of Pennsylvania challenging the decision of the Board in reducing his position and salary.

DISCUSSION

The initial issue is whether the reduction of Appellant's position amounted to a suspension or a demotion. Section 1151 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1151, (School Code) deals specifically with demotions:

> "The salary of any district superintendent, assistant district superintendent or other professional employee in any school district may be increased at any time during the term for which such person is employed, whenever the board of school directors of the district deems it necessary or advisable to do so, but there shall be no demotion of any professional employee either in salary or in type of position without the consent of the employee, or, if such consent is not received, then such demotion shall be subject to the right to a hearing before the board of school directors and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employee."

It is apparent from a reading of Section 1151 that a demotion can occur *either* from a reduction of salary or from unfavorable changes in type of position. *Isban v. Department of Education*, 34 Pa. Commw. Ct. 88, 382 A.2d 1266, (1978). In the case before the Secretary, the Appellant's position has clearly been changed from full-time to half-time. Also the Appellant has received a proportionate reduction in the amount of compensation for the position. These factors support the conclusion that the Appellant had been demoted as opposed to suspended. *Black v. Wyalusing Area School District*, 27 Pa. Commw. Ct. 176, 365 A.2d 1352 (1976).

In the instant case, Appellant asserts that a suspension occurred, as opposed to a demotion.[1] Section 1124 of the School Code deals with suspensions. A suspension under Section 1124 could be characterized as a furlough or the *laying-off* of a professional employee, which is a total separation of the employee from his job. *Kaplan v. Philadelphia School District*, 388 Pa. 213, 217, 130 A.2d 672, 675 (1957) (emphasis added). In the case before the Secretary, the Appellant was not laid off or furloughed. His position was reduced in pay and responsibility from full-time to half-time. Therefore, it is clear that the action of the School District in this case amounted to a demotion, not a suspension.

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[1] If this were a suspension, the Secretary would not have jurisdiction and therefore would have to dismiss the appeal.

The next issue before us is whether the demotion was properly effectuated, and, related to that point, whether the ratings for the school year 1978-79 should have been used in making the decision. Under Section 1151 of the School Code, nonconsensual demotions do require a hearing, and they are not effective until there has been an adjudication. The Appellant was granted a hearing on the proposed action of the School Board. Appellant does not allege any defects in the hearing itself, other than the use of the ratings from the year 1977-78, instead of 1978-79.

Appellant cites the case of Smith v. Richland School District, 387 A.2d 974 (1978) for the principle that prior year means the year preceding the current rating and that, therefore, the School Board in this matter should have waited for his 1978-79 rating and then made their decision. However, Smith does not apply to the matter before us for two reasons. First, it deals specifically with a suspension situation. In light of Lawrence Patchel v. Board of School Directors of the Wilkinsburg School District, 400 A.2d 299, (1979), the requirements of ratings necessary for suspensions is not applicable to demotions. Patchel involved a demoted employee who argued that his rating did not conform to the procedure mandated by the School Code. In Patchel, the Commonwealth Court agreed with the Secretary's interpretation that since the petitioner was not a temporary professional employee, and since he was not suspended or dismissed, the sections of the School Code requiring ratings did not apply. Consequently, Smith is not determinative of the legality of this demotion.

Secondly, in Smith, the ratings for the prior year were available for all of the employees concerned. In the present case, the Appellant would have the School District wait for approximately 40 days after the Board adopted the resolution proposing the demotion. The School District used the ratings which were available, and presently before them. It is clear that it is within the power of the School Board to make this decision as to how an individual may be demoted as long as it is not arbitrary or discriminatory. In Smith v. Darby School District, 388 Pa. 301, 130 A.2d 661 (1957), the Supreme Court stated, "It would be presumptuous to superimpose judicial control upon the exercise of discretion by trained educators. The legislature has vested wide powers in the board of school directors... Our appellate courts repeatedly have affirmed their exercise of this discretion." Consequently, the School Board pursuant to Section 1151 of the School Code may hold a presumptively valid hearing and the employee has the burden of proving that the Board acted in bad faith or discriminatorily. The Board has explained its reason for using the available 1977-78 ratings. Appellant has not shown that this decision was either arbitrary or discriminatory or that the Board acted in bad faith. Therefore, the Secretary must affirm the Board's exercise of its discretion.

Accordingly, we hereby make the following:

ORDER

AND NOW, this 29th day of February, 1980, it is hereby ORDERED and DECREED that the appeal of Russell C. Thomas is dismissed, and that the decision of the Board of School Directors of the Pottstown School District demoting Mr. Thomas, be affirmed.

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

ROGER J. MORGAN, :
Appellant :
:
v. : Teacher Tenure Appeal
: No. 12-79
ALTOONA AREA SCHOOL DISTRICT, :
Appellee :

OPINION

Roger J. Morgan, Appellant herein, has appealed from a decision of the Altoona Area School District dismissing him as a professional employee on the grounds of immorality.

FINDINGS OF FACT

1. Appellant, Roger J. Morgan, is a professional employee of the Altooha Area School District, having been continuously employed as a teacher since the 1961-62 school year.

2. On or about May 3, 1979, Appellant was arraigned on various criminal charges, including involuntary deviate sexual intercourse, indecent assault and corrupting the morals of a minor.

3. Appellant was given oral notice that he was placed on suspension without pay on May 3, 1979.

4. Following a preliminary hearing, Appellant was bound over for court action on the criminal charges.

5. On June 28, 1979, pursuant to provisions of the Public School Code, Appellant received written notice of a dismissal hearing to be held before the Altoona Area School Board on July 11, 1979.

6. Said notice referred to the recommendation of the Administration to the School Board that he be dismissed as a professional employee of the district based upon a statement of charges attached to the letter which concerned allegations of sexual abuse made against him by seven (7) of his sixth grade male students charging crimes of corruption of minors, indecent assault, and, as to two of the students, involuntary deviate sexual intercourse.

7. At the school board hearing, Mr. Morgan was represented by legal counsel who requested a continuance of the hearing until after the complete termination of pending criminal proceedings in the Blair County Court. The request was denied by the School Board. Mr. Morgan's legal counsel raised no other objections and, with Mr. Morgan, left the hearing.

8. The Altoona Area School Board, after Mr. Morgan and his counsel had excused themselves from the hearing room indicating that they would not remain to hear testimony, heard the testimony of all seven (7) students.

9. The Altoona Area School Board, at a special meeting on July 11, 1979, following the hearing, voted to dismiss Roger J. Morgan as a professional employee and so notified him in writing on July 19, 1979.

10. On or about August 11, 1979, pursuant to Section 1131 of the Public School Code, an Appeal was filed by Mr. Morgan before the Secretary of Education on the basis that the School Board had improperly denied the request for a continuance.

11. A hearing on this Appeal was held on September 13, 1979 before a hearing officer designated by the Secretary of Education.

DISCUSSION

In taking this appeal, Mr. Morgan, Appellant herein, contends that the Altoona Area School District should have delayed his dismissal hearing until after the disposition of the criminal charges pending against him. We find this contention to be without merit. Accordingly, we must sustain the decision of the school board dismissing Appellant as a professional employee for immorality.

Appellant's position in the instant case is that Appellee's conduct in holding the dismissal hearing violated Appellant's rights under the Fifth Amendment. The Fifth Amendment to the United States Constitution, as applied to the various states by the Fourteenth Amendment, guarantees a citizen the right against self-incrimination in any criminal case. While the Fifth Amendment right against self-incrimination is clear, the Secretary is not aware of any additional right that would guarantee that Mr. Morgan be protected from presenting his defense in a civil hearing before the school board.

The case of Cotter v. State Civil Service Commission, 6 P.W.C.T. 498 (1972) provides circumstances similar to the case before us. In Cotter, the individual was charged with the sale of a stolen motor vehicle. Mr. Cotter asked for a continuance of his hearing before the State Civil Service Commission in order to decide whether his Fifth Amendment rights in the subsequent criminal action would be waived by testifying in his own defense in the employment hearing. The guideline set in Cotter was whether the continuance in the civil hearing regarding

Mr. Cotter's continued employment would be "in the furtherance of justice." As the Appellee in the case before us states in his argument, application of this guideline involves the balancing of individual rights against societal rights in each particular case.

Although the court did grant a brief continuance in Cotter, the court said:

> "...We are not holding that the Commission was bound to continue its Hearing until the criminal charges filed against the Appellant had been finally disposed of by the criminal courts."

In attempting to balance the prejudice that would be suffered in the instant case, it is clear that the school board had no choice but to deny the request for a continuance pending criminal disposition. We must be cognizant of the fact that a school district has an obligation to foster the well-being of its students. The case before us is a very sensitive situation, involving the rights of an individual not yet tried and found guilty of any offense. However, we must be aware that teachers in today's society must serve as role models for their students. The school district must weigh the teacher's position as a model for students against the teacher's individual rights outside that role model. In the case before us, not only was Appellant charged with criminal conduct, he was charged with conduct which involved threatened damage to his students. It is our opinion that in balancing the interests of Appellant and of his students, the school district properly decided to dismiss Appellant.

There was also some discussion on the part of the Appellant that the District Attorney might seize the transcript of his dismissal hearing and subsequently use it against Appellant. In Garrity v. New Jersey, 38S.U.S. 493 (1967), the Supreme Court of the United States essentially decided that issue. The Supreme Court in Garrity concluded that the giving of testimony before a private tribunal under threat of loss of employment does not constitute a waiver of Fifth Amendment rights (emphasis added). In the case before us, the hearing was private at the Appellant's request and under the authority of the Public School Code. It was made clear to all participants that the hearing was not to be discussed outside the forum of the tribunal. Consequently, as the School Board has argued, Appellant would not in his civil hearing have revealed his criminal defense to the District Attorney. The Garrity case makes it clear that any testimony given would not waive Appellant's Fifth Amendment rights in the subsequent criminal proceedings.

Accordingly, we make the following:

ORDER

AND NOW, this 7th day of December, 1979, it is hereby ordered and decreed that the Appeal of Roger Morgan be and hereby is dismissed.

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA

Department of Education

Carroll Bittner,
Appellant
v.
Jershey Shore Area School District,
Appellee

Teacher Tenure Appeal No. 13-79

OPINION

Carroll Bittner, Appellant herein, challenges the computation by the Jershey Shore Area School District of the back pay provision in the Order of the Secretary of Education in her Teacher Tenure Appeal No. 234, which Order was affirmed by the Pennsylvania Supreme Court.

The essential facts in this proceeding are not at issue. At a hearing before the Secretary's hearing examiner held October 1, 1981, the parties stipulated as follows (Tr. 7):

1. Mrs. Bittner was terminated by the Jersey Shore Area School District at the start of the 1973-1974 school year. Tr. 3, 4.

2. At that time, the District denied Mrs. Bittner a hearing; and she appealed to the Secretary of Education. Tr. 4.

3. Subsequently, on December 3, 1973, Mrs. Bittner began to serve as a member of the Board of Directors of the Jersey Shore Area School District and has continued to serve in that capacity at all times relevant to this case. Tr. 4.

4. Following the hearing on June 20, 1974, before the Secretary of Education, the Secretary ordered that Mrs. Bittner's appeal be sustained and that the District reinstate her without loss of pay. Teacher Tenure Appeal Number 234 issued July 25, 1975. Tr. 4.

5. The District appealed the Secretary's decision to the Commonwealth Court, which reversed the Secretary's decision on March 9, 1976. Department of Education v. Jersey Shore Area School District, 23 Pa. Commonwealth Ct. 624, 353 A.2d 91 (1976). Tr. 4.

6. Mrs. Bittner appealed that decision to the Pennsylvania Supreme Court, which reversed the Commonwealth Court, and ordered that the Secretary of Education's order be reinstated. Commonwealth, Department of Education v. Jersey Shore Area School District, 481 Pa. 349, 392 A.2d 1331 (1978).

7. The Supreme Court's decision was handed down October 5, 1978. ibid. Tr. 4.

8. After some vacillation and after being offered a teaching position by the Board, Mrs. Bittner elected to resign her status as a tenured professional employee effective October 5, 1978, the date of the Supreme Court's decision. Tr. 4. Joint Exhibit No. 7-10.

9. According to a letter of December 14, 1978, Jack G. Wolf, Secretary and Business Manager of the District, advised Mr. Carpenter, the District Solicitor, that if backpay were awarded for the period September 4, 1973, to October 5, 1978, Mrs. Bittner's entitlement would be $50,646.20. Tr. 4-5. Joint Exhibit No. 12.

10. Mr. Wolf further stated that if backpay is only calculated from September 4, 1973, to December 3, 1973, the date that Mrs. Bittner became a School Board member, then her entitlement would be only $2,727.38. Tr. 5. Joint Exhibit No. 12.

11. By resolution of August 31, 1978, the Board tendered to Mrs. Bittner the latter sum, $2,727.38, together with interest thereon at the rate of 6 percent per annum. Tr. 5. Joint Exhibit No. 11.

12. Meanwhile, on August 15, 1979, Mrs. Bittner filed an application for relief in the Pennsylvania Supreme Court seeking to compel the District to pay her back wages. Tr. 5.

13. In its answer, the District raised the defense that Mrs. Bittner was not entitled to backpay for the period of time that she sat on the Board. Tr. 5.

14. In a per curiam order of September 12, 1979, the Court referred this matter back to the Secretary of Education to determine the School District's compliance with his earlier order of June 25, 1975. Tr. 4.

15. In its brief of April 1980 to the Secretary, the District proposed that Mrs. Bittner submit a sworn statement of her earnings to be considered in abatement of loss of pay. Tr. 6.

* * *

In addition to the above stipulated facts, we find the following:

16. By affidavit of July 10, 1981, Ms. Bittner, swore to the following weekday, daytime earnings:

A. September 4, 1973-December 3, 1973 - $605.32

B. December 4, 1973-October 5, 1978 - $10,444.54

and

C. Unemployment Compensation (1976 and 1977) - $2,177.50

She further swore that she had earned "nominal sums" as a hairdresser on Friday evenings and Saturday mornings.

17. On October 1, 1981, at the request of the District, a hearing was held before the Secretary's hearing examiner primarily to cross-examine Ms. Bittner concerning her earnings and for the purpose of oral argument. Tr. 6. Testimony was also taken regarding whether Ms. Bittner had intended to run for the School Board prior to her termination as a teacher. Tr. 7.

18. Ms. Bittner's testimony concerning her earnings, in support of her affidavit, was credible, reasonable and consistent, and, there being no information in the record to the contrary, we accept her affidavit as accurate and complete.

19. It is unclear from the record as to which employment of Ms. Bittner gave rise to her receipt of unemployment compensation.

20. Ms. Bittner's testimony that she did not decide to run for the School Board until after her teaching position was terminated was entirely credible, and, there being no evidence to the contrary, we accept her statements as true. Tr. 29-31.

DISCUSSION

This remand raises two issues*:

I. Is Mrs. Bittner entitled to back pay for the period of time during which she served as a member of the Board of School Directors?

II. Is the Board entitled to deduct from her back pay award her earnings during the period that she was unlawfully terminated?

I. Board Membership As a Bar to Back Pay

The District asserts that it is only required, indeed allowed, to pay Mrs. Bittner back wages for the period September 4, 1973, to December 3, 1973, which it calculates to be $2,727.38 plus interest. It asserts that it cannot pay back wages from the period December 3, 1973, to October 5, 1978 (the effective date of Mrs. Bittner's resignation as a professional employee) because she was a school board member during that period. Mrs. Bittner asserts that she is entitled to back pay for the period September 4, 1973, to October 5, 1978, which the District calculates to be $50,646.20, plus interest. Mrs. Bittner has not challenged the accuracy of the two calculations.

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*At the hearing on remand before the Secretary of Education's hearing examiner, Mrs. Bittner dropped a third potential issue: a claim to attorney's fees in the instant proceeding. Tr. 26, 27.

The District relies upon Section 322 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended. Section 322 provides that any "teacher, or employe of any school district shall not be eligible as a school director in this Commonwealth . . ." 24 P.S. §3-322. Although not cited by the District, Section 324 is also relevant. It provides that, "No school director shall, during the term for which he was elected or appointed . . . be employed in any capacity by the school district in which he is elected or appointed, or receive from such school district any pay for services rendered to the district except as provided in this act. . ."24 P.S. §3-324.

In response, Mrs. Bittner asserts first that this defense is barred by the doctrine of res judicata, and second that the defense is wrong as a matter of law.

A. Res Judicata

Mrs. Bittner was sworn in as a school director of the District on December 3, 1973. The original hearing on her Teacher Tenure Appeal No. 234, was held before the Secretary of Education on June 20, 1974, half a year later. The District did not raise her membership on the Board as a defense at said hearing or at any stage of that appeal through the courts.

In her brief, Mrs. Bittner asserts the following:

> Pennsylvania law is clear that "the final determination by a court of competent jurisdiction settles not only the defenses actually raised, but also those which might have been raised." *Duquesne Light Company v. Pittsburgh Railway Company*, 413 Pa. 1, ___, 194 A.2d 319, 321 (1963). What the Supreme Court recognized as the basis for the doctrine of res judicata in *Duquesne* is equally applicable in the instant case:
>
> 'The res judicata doctrine is designed to prevent the very situation which would result if appellant's second petition were granted, namely, the injection of a new issue into the case after almost four years of litigation. *Id.* (See also *Jenkins v. Jenkins,* ___Pa. Superior ___, 371 A.2d 925, 929 (1977); *Keystone Building Corporation v. Lincoln Savings and Loan Association*, ___Pa. Superior ___, 335 A.2d 817, 819 (1975)).'
>
> All of the elements of res judicata are present in this case, to wit, identity of the thing sued for; identity of the cause of action; identity of the persons and parties to the action; identity of quality of the persons for or whom the claim was made. *London v. City of Philadelphia*, 412 Pa. 496, ___, 194 A.2d 91, 903 (1963). The parties to the original litigation that terminated in the Supreme Court are the same as the parties to the present litigation. The cause of action is identical; the quality of the parties is identical, and the thing sued for is identical, to wit, reinstatement and back salary. As a result, the School District is now barred by the doctrine of res judicata from raising as a defense to an award of back pay Carroll Bittner's membership on the school board. The District could have raised this defense in the original proceedings and elected not to do so. As the Supreme Court indicated in *Duquesne*, it cannot now raise the defense or attempt to raise the defense after more than five years of litigation.

Brief of Carroll Bittner pp. 3-4.

In response, the District in its brief asserts:

> The only time this factor could have been presented into the record was at the original Department of Education hearing. At no further stage of the proceedings, i.e. Appeal to the Commonwealth Court and the subsequent Appeal to the

> Supreme Court, was this factor able to be placed in the record.

Brief of Jersey Shore Area School District, p. 1.

Obviously, this response begs the question. The District asserts no reason why Mrs. Bittner's school board membership could not have been raised by it at her original hearing in June 1974. Having failed to raise this issue in June 1974, the District clearly is barred by the doctrine of _res judicata_ from injecting it into the proceedings in August 1979, over five years later. The purpose of the doctrine of _res judicata_ is precisely to bar this type of long delayed introduction of new issues into cases already litigated, in order that there will be some finality to the judicial process.

Accordingly, it is our opinion that Mrs. Bittner is entitled to back pay for the period September 3, 1973, to October 5, 1978, specifically including all that time during which she served as a board member.

B. Merits

However, in the interest of administrative and judicial economy, and to avoid a third hearing before the Secretary, we will express our opinion as to whether Mrs. Bittner's board membership would have precluded an award of back pay if that issue had been properly raised by the District at the first hearing.

This question appears to be a matter of first impression in the Commonwealth, and neither side has cited authority directly on point. Nevertheless, there is guidance in a number of judicial opinions.

In a case decided under the School Code of 1911, the Pennsylvania Supreme Court held that an individual was not disqualified from being a school board member because either he had an outstanding claim for money against the district or vice versa. Zeigler's Appeal, 238 Pa., 280 (1937). Thus, it cannot be claimed that there was anything wrongful or improper in Mrs. Bittner running for and taking her position on the school board because of her claim against the district. To the contrary, it was the district's prior action in terminating Mrs. Bittner that was held by the Pennsylvania Supreme Court to have been improper. Commonwealth, Department of Education v. Jersey Shore Area School District, 481 Pa. 349, 392 A.2d 1331 (1978). Further, in that decision, the Court cited with approval the following language from Mullen v. DuBois Area School District, 436 Pa. 211, 217, 259 A.2d 877, 880-81 (1969):

> The burden of complying with the statute rests with the school boards; should they fail to conduct their business as required, the consequences ought to lie at their door, not at the door of their victims. They must not be permitted to advantage themselves of their own failures to the detriment of their employes.

481 Pa. 356, 366, 392 A.2d 1331, 1336.

Accordingly, we see no reason why the consequences of the board's illegal termination of Mrs. Bittner as a professional employe should not rest with the Board, and no reason why Mrs.

Bittner's lawful election to the Board should be at the price of her lawful claim to back pay.

The Pennsylvania Supreme Court has dealt with the analogous situation in which a lawyer was elected to the Court of Common Pleas, could not take office when his term was to have commenced because of a challenge to his election and continued to practice law until he actually took the oath of office some time later. In Reed v. Sloan, 475 Pa. 570, 381 A.2d 421 (1977), the Court held that Judge Reed was entitled to back pay for the full term of his office even though he could not have practiced law had he been sworn in when his term was supposed to commence. The Court noted:

> The fundamental fallacy in appellant's position is the failure to distinguish between the current holding of two incompatible positions and the right to payment of salary for an office where there has been an involuntary deferred assumption of that position. The evil sought to be avoided by the incompatibility provisions is the improper performance of the duties of the office which might be inspired by the holding of an incompatible position. The fact that the person derives income from the incompatible position is only significant in that it might provide the incentive to improperly discharge the responsibilities of the public office. In the context of a deferred assumption of office it is therefore clear that the receipt of salary during the period during which the office holder was prevented from discharging the duties of the office could in no way occasion the harm sought to be avoided by our doctrine of incompatible offices.
>
> Pa. at 577-8, A.2d at 424-5.

The reasoning of the Court in Reed v. Sloan applies directly to Mrs. Bittner's situation. Just as the Supreme Court found nothing improper in Judge Reed practicing law while awaiting a decision on his election to the bench, we perceive nothing wrong with Mrs. Bittner sitting on the Board while awaiting a decision on her teaching status.* Just as the Court found Judge Reed entitled to back pay for the period that he practiced law while involuntarily prevented from serving as a judge, we find Mrs. Bittner entitled to back pay for the period that she sat on the Board while involuntarily and improperly prevented from serving as a teacher. Ergo, even had her board membership been properly raised, we would nevertheless conclude that she is entitled to back pay for the period September 4, 1973, through October 5, 1978.

II. Set-Off for Earnings

A number of decisions of the Commonwealth Court indicate that a district is entitled to a setoff against his back pay award of a teacher's earnings during the time of an improper suspension. Eastern York School District v. Long, 46 Pa. Commonwealth Ct. 209, 407 A.2d 69 (1979), Cigarski v. Lake Lehman School District, 46 Pa. Commonwealth Ct. 297, 407 A.2d 460 (1979), Shearer v. Secretary of Education, 57 Pa. Commonwealth Ct. 266, 424 A.2d 633 (1981). Shearer further notes:

> However, income earned by petitioner from jobs held on nights and weekends should not be set off against the back pay award. Petitioner could have held those positions concurrently with his teaching job; thus, they should not be held to diminish further his recompense for wrongful discharge.

Pa. Commonwealth Ct. at 270, A.2d at 635.

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*It has never been alleged that Mrs. Bittner has ever participated as a Board member in anything having to do with her claim to her teaching position.

Secretary Pittenger's original Order in this case decreed "that the Appeal of Carroll Bittner be sustained and the Board of Directors of the Jersey Shore Area School District reinstate her without loss of pay and with the status of professional employee." Teacher Tenure Appeal No. 234, June 25, 1975. This Order was specifically reinstated by the Pennsylvania Supreme Court. 481 Pa. 356, 367, 392 A.2d 1331, 1337 (1978). The Commonwealth Court has clearly indicated that an order of reinstatement "without loss of pay" is not inconsistent with a right to set off earnings. Eastern York School District v. Long, supra, Pa. Commonwealth Ct. at 213, A.2d at 70-71.

Since Secretary Pittenger's reinstated Order implied a right to set off, and since there is a clear right to set off, we hold that the District is entitled to set off Mrs. Bittner's weekday earnings. We note that Mrs. Bittner has not raised the issue of res judicata with regard to set-off. Since set-off was encompassed within the Secretary's original order, res judicata would not appear to bar it. As noted, her evening and weekend earnings are not set off against her back award. Furthermore, while the District may set off her unemployment compensation, it must comply with Sections 704 and 705 of the Unemployment Compensation Law, the Act of December 5, 1976, Second Ex. Sess., P.L. (1937) 2897, as amended, added by Section 8 of the Act of July 7, 1977, P.L. 41, 43 P.S. §864,865. Shearer v. Commonwealth, Secretary of Education, id., 424 A.2d at 635.

Accordingly, we make the following:

ORDER

AND NOW, this 12 day of February, 1982, the Appeal of Carroll Bittner is sustained and our Order of July 25, 1975, in Teacher Tenure Appeal 234 is clarified, to wit:

The Jersey Shore Area School District shall pay Carroll Bittner back pay in the amount of $50,646.20 with interest at the rate of six per cent (6%) per annum, less:

(a) the amount of $11,049.86 representing actual weekday wages from other sources, and

(b) the amount of $2,177.50 representing unemployment compensation benefits, which amount the District shall pay into the Unemployment Compensation Fund, per 43 P.S. §864.

Robt G. Scanlon

ROBERT G. SCANLON
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

LEWIS ZIEGLER, :
Appellant :
:
v. : Teacher Tenure Appeal
: No. 15-79
RIDGWAY AREA SCHOOL DISTRICT, :
Appellee :

OPINION

Lewis Ziegler, Appellant herein, has appealed from a decision by the Ridgway Area School District dismissing him as a professional employee pursuant to the district's mandatory retirement policy.

FINDINGS OF FACT

1. Lewis Ziegler is a professional employee of the Ridgway Area School District who has been employed since December, 1945 as a music teacher.

2. On March 13, 1978, the Ridgway Area Board of School Directors (hereinafter referred to as the Board) adopted a retirement policy, which states in part:

> RETIREMENT - Employees of the Ridgway Area School District shall retire at age 65 (70, effective January 1, 1979). If an employee shall become 65 years of age (70 years of age January 1, 1979) prior to August 15th of any calendar year, the employee shall retire at the close of the preceding school term. If the employee shall become 65 years of age (70 years of age January 1, 1979) on or after August 15th of any calendar year, the employee shall continue in his/her position until the close of the following school term.

3. Lewis Ziegler reached the age of sixty-five (65) on November 11, 1978.

4. On May 25, 1979, Lewis Ziegler was informed by letter from the superintendent of the school district that Mr. Ziegler had reached the mandatory retirement age, and therefore his retirement would become effective at the close of the 1978-79 school year.

5. On June 1, 1979, Lewis Ziegler made a written request for a dismissal hearing before the Board.

6. On July 19, 1979 the hearing was held on Lewis Ziegler's dismissal.

7. On August 13, 1979, the Board sustained the dismissal of Lewis Ziegler pursuant to the school district's retirement policy.

8. On September 2, 1979, Lewis Ziegler received notification by mail of the action taken by the Board. Such notification was not sent by registered mail.

9. On October 1, 1979, an Appeal from the Board's decision was mailed to the Secretary of Education.

10. On October 4, 1979, the Appeal of Lewis Ziegler was received by the Secretary of Education.

11. On October 25, 1979, the school district filed a Motion to Strike the Appeal of Lewis Ziegler, alleging that the Appeal was untimely filed.

12. On November 13, 1979, Appellant filed an Answer to Appellee's Motion to Strike.

13. On November 15, 1979, a hearing on this Appeal was held before a hearing examiner appointed by the Secretary of Education.

DISCUSSION

The Appellant contends that the hearing before the Ridgway Area Board of School Directors failed to comply with procedural due process as guaranteed by the United States Constitution and with the Equal Protection Clause of the United States Constitution. The Appellant further contends that the action taken by the Board is in violation of the Age Discrimination in Employment Act, 29 U.S.C.§621 *et seq.*

Appellee contends that the Appeal should be dismissed for the failure of the Appellant to file the Appeal within thirty (30) days after being notified of the School Board's decision, pursuant to 24 P.S. §11-1131. Appellee also contends that the Age Discrimination in Employment Act (hereinafter referred to as the ADEA) does not apply to public school teachers. Appellee further contends that even if the ADEA did apply to teachers, Appellant's retirement was based upon a bona fide pension plan applied uniformly to all employees. Finally, the Appellee contends that the Secretary of Education lacks jurisdiction over this Appeal. We hold that the Secretary of Education does lack jurisdiction over this Appeal, consistent with our recent decision in Mary Card v. Troy Area School District, Teacher Tenure Appeal 27-78.

As noted above, Appellant's arguments are based upon alleged violations of the United States Constitution and the ADEA. The Appellant did not challenge the validity of Section 1122 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1122. Section 1122 expressly permits school districts to formulate mandatory retirement policies. Section 1122 provides as follows:

> The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocation of or participating in un-American or subversive doctrines, persistent and willful violations of the school laws of this Commonwealth on the part of the professional employee: Provided, That boards of school directors may terminate the service of any professional employe who has attained to the age of sixty-two except a professional employe who is a member of the old age and survivors insurance system pursuant to the provisions of the act, approved the first day of June, one thousand nine hundred fifty-six (Pamphlet Laws 1973). In such case the board may terminate the service of any such professional employe at the age of sixty-five or at the age at which the employe becomes eligible to receive benefits under the Federal Social Security Act.

Despite Appellant's failure to challenge Section 1122 of the School Code, in order to sustain Appellant's claim the Secretary would have to find Section 1122 to be unconstitutional or invalid because of it being in conflict with the ADEA. The Secretary is without authority to make that decision. Therefore, we find that the Secretary of Education lacks jurisdiction over the Appeal of the Appellant.

We also find it unnecessary to rule on Appellee's Motion to Strike Appellant's Appeal, alleging untimely filing on behalf of the Appellant, for the following reasons.

According to the decision in Cary v. School District of Lower Merion, et al., 362 Pa. 310, 66 A.2d 762 (1949), the right to a dismissal hearing before the school board arises subsequent to the dismissal of a professional employe by a school board for one of the reasons listed in Section 1122 of the School Code. Those causes for termination entitling a professional employe to a dismissal hearing are the following: immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, or persistent and willful violation of the school laws of the Commonwealth. The Pennsylvania Supreme Court held in Cary that, with respect to the above listed causes for dismissal:

> "Since charges of that nature are an attack on character or competency the law properly provides that in order to defend against them the employe is entitled to a formal hearing, but such a hearing is not required by the School Code where the employe's contract is terminated in accordance with the provision for retirement on age. (Emphasis added.)

Id., 362 Pa. 310, 312-13, 66 A.2d 762, 763 (1949).

This conclusion appears to be consistent with federal law. The Fourteenth Amendment's procedural protection of property is a safeguard when a person has a right to and expectation of continued employment Board of Regents v. Roth, 408 U.S. 566 (1972). Under §1122 of the School Code and the Board's policy, no such right or expectation exists. Therefore, no right to a dismissal hearing for this Board's mandatory retirement policy exists in the state law under which the Secretary has authority to act.

Thus, without reaching the decision as to whether or not there was a violation of procedural due process in the hearing before the Ridgway Area Board of School Directors, we find that pursuant to the School Code Appellant was not initially entitled to a hearing and consequently is not entitled to an appeal from that hearing under Section 1131 of the School Code. Therefore, we may make no decision as to Appellant's allegation of a denial of procedural due process.

Even if Section 1131 applied, the scope of review for Section 1131 does not grant the Secretary the authority to declare Section 1122 to be unconstitutional or invalid as being in conflict with the ADEA.

> The (Secretary of Education) shall review the official transcript of the record of the hearing before the board, and may hear and consider such additional testimony as he may deem advisable to enable him to make a proper order. At said hearing the litigants shall have the right to be heard in person or by counsel or both.
>
> After hearing and argument and reviewing all the testimony filed or taken before him, the (Secretary of Education) shall enter such order, either affirming or reversing the action of the board of school directors, as to him appears just and proper." 24 P.S. § 11-1131. (Emphasis added.)

Thus, in his review of a board's action concerning a professional employee, the Secretary of Education has been conferred with no statutory authority to consider the constitutionality or the validity of a section of the School Code. He has been given the authority to review the board's action in dismissing under Section 1122, not to review the General Assembly's action in legislating the statute. The Secretary has taken the position that it would be presumptuous, as well as counter-productive, to attack the constitutionality or validity of a statute which grants him the authority to act:

> "The consideration of the constitutionality of acts of assembly is a function for the courts. The law does not give the Secretary of Education any authority to adjudge an act of assembly unconstitutional, and in the absence of any court decision on the point, it is our judgment that the presumption

> of constitutionality pertains." *Commonwealth v. Yerkes*, 285 Pa. 39 cited in *Appeal of Watson*, Supt. of Public Instruction Opinion No. 78 (1951).

See also *Borough of Greentree v. Board of Property Assessments of Allegheny County*, 459 Pa. 268, 328 A.2d 819 (1974).

Accordingly, we thereby make the following:

ORDER

AND NOW, this 19th day of September , 1980, the Appeal of Lewis Ziegler from the dismissal by the Ridgway Area School District is hereby dismissed.

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

Michael Micklow, :
Appellant :
:
v. : Teacher Tenure Appeal No. 16-79
:
Fox Chapel Area School :
District, :
Appellee :

OPINION

Michael Micklow, Appellant herein, has appealed from the decision of the Board of School Directors of the Fox Chapel Area School District dismissing him as a professional employee on the grounds of persistent and willful violation of the school laws of the Commonwealth and persistent negligence.

FINDINGS OF FACT

1. Appellant, Michael Micklow, was first employed by the Fox Chapel Area School District (hereinafter "the District") as a temporary professional employee in January 1966. N.T. 326, 692.

2. Micklow became a professional employee in January, 1968. N.T. 44.

3. Micklow filed a grievance against his principal, Lucas Pavlovich, on May 25, 1979. Joint Exhibit 1.

4. A determination in favor of Principal Pavlovich was made on the aforesaid grievance on June 15, 1979 by Dr. Jack Roush, Assistant Superintendent. Joint Exhibit 1.

5. On June 11, 1979, the Board of School Directors of the Fox Chapel Area School District (hereinafter "the Board") adopted a resolution directing the District Superintendent to prepare a written statement of charges for the proposed dismissal of Micklow. Certified Resolution of June 11, 1979.

6. On June 13, 1979, the Board adopted a Statement of Charges on the grounds of persistent and willful violation of the school laws of the Commonwealth and persistent negligence. Administration Exhibit 1.

7. The specific factual allegations in the Statement of charges read as follows:

(1) misuse of sick leave on June 14, 1978;

(2) failure to follow established procedures and securing approval of principal prior to leaving building during school day on at least seven occasions during the 1978-79 school year and on several occasions during the 1976-77 school year;

(3) failure to attend Open House on October 20, 1977;

(4) insubordination with respect to paragraphs (2) and (3) hereof;

(5) transporting students and encouraging parent carpools during the 1977-78 school year and on May 30, 1979;

(6) failure to follow directives relating to the collection of money from students on May 17, 1979, which resulted in loss of funds.

(7) making negative and unprofessional comments to elementary school students during the 1977-78 school years; and

(8) making unprofessional and derogatory remarks in the presence of students and parents concerning the principal during the 1977-78 and 1978-79 school years and in prior school years.

Administration Exhibit 1.

8. The charges and notice of hearing were properly served on Micklow. N.T. 4.

9. The board held an extensive hearing on the charges in eight sessions starting June 26, 1979 and finishing on August 2, 1979. N.T. 1, 758.

10. During the hearing, much of Dr. Pavlovich's testimony involved or was supported by notes he had taken concerning Micklow or notes from Micklow upon which he wrote comments which were not made a part of Micklow's personnel file. Several of these items were introduced as administration exhibits.

11. When Micklow reviewed his personnel file in preparation for the hearing, he was told of the existence of these additional documents and they were delivered to him. N.T. 338-339.

Evidence was adduced as follows:

Charge No. 1

12. Micklow was absent from work on June 14, 1978, which he reported as due to personal illness. Administration Exhibit 7.

13. Another teacher, John Phillips, was absent the same day. N.T. 53.

14. Emily Strohm, a former student, testified that the day before Micklow's absence in June 1978, she overheard Micklow and Phillips arranging a golf date for the next day. N.T. 250-252.

15 Another student testified that she had overheard the golf conversation, but did not know when the game was to take place. N.T. 40-46.

16. Dr. Pavlovich testified that Micklow twice admitted to him that he had gone golfing on June 14, 1978. N.T. 46, 147, 151.

17. Both Micklow and Phillips testified that they were not golfing on June 14, 1978, and had never admitted that they had been. N.T. 33, 35, 333, 334, 335.

18. Micklow did admit a previous incident in 1971 when he put in for sick leave, but was discovered at a convention in

Atlantic City by Superintendent Burk. He characterized his request for sick leave as "accidental". N.T. 445.

19. There is substantial credible evidence that Micklow did misuse sick leave to go golfing on June 14, 1978.

Charge No. 2

20. The hours at the Kern Elementary School, where Micklow taught, were 8:30 a.m. - 4:00 p.m. N.T. 54.

21. According to Principal Pavlovich, a teacher wishing to leave early had to get his prior permission, then fill out a three by five card for him to keep on file. N.T. 55, 155.

22. Dr. Pavlovich testified that Micklow left school early without his prior permission on October 25, 1978, December 6, 1978, March 12, 1979, March 21, 1979 and April 25, 1979, and that on these occasions Micklow simply left a 3 x 5 card and walked out. N.T. 65, 66, 68, 69, 70, 71.

23. Dr. Pavlovich further testified that on May 25, 1979, he posted a notice on the door of the teachers' room, specifically instructing all staff members not to request permission (to leave early) to go to the bank that day. N.T. 76-77, Administration Exhibit 6.

24. Despite the posted notice, Micklow proceeded to fill out a 3 x 5 card for leave and was told by Dr. Pavlovich of the

notice and that he could not leave early. Micklow stated that he was going anyway, and he did so. N.T. 79-84. Administration Exhibit 18.

25. At his hearing, Micklow admitted leaving early on October 25, 1978 and December 6, 1978, and acknowledged writing out the 3 x 5 cards for March 12, 1979, March 21, 1979, April 25, 1979. N.T. 345-349.

26. Regarding May 25, 1979, Micklow acknowledged that Dr. Pavlovich told him of the notice not to request early leave, told him to go the bank at 3:30, told him not to leave early, and that he nevertheless did leave early to go to the bank. N.T. 351- 356.

27. Micklow also acknowledged having left early on two occasions during the 1976-77 school year. N.T. 361.

28. Micklow's main explanation is that as of October 1978, Dr. Pavlovich did not require prior approval for an early leave. N.T. 345.

29. Dr. Pavlovich's statement of his policy requiring his prior permission to leave early was verified by faculty members Marge B. Ryznar, Jeanne Bodnar, Eileen Kunkle, Charles Ross, Sandy Schaltenbrand and Dorothy Lavia. N.T. 266, 283, 284, 295, 649, 687-688, 744, 745.

30. There is substantial credible evidence that Micklow failed to follow established procedures and secure approval prior to leaving the building during the school day on several occasions during the 1976-77 and 1978-79 school years.

Charge No. 3

31. Open house is a very significant event in the school year and attendance of teachers is required in their collective bargaining agreement. N.T. 10-13, 102-103. Administration Exhibit 2.

32. Although Micklow taught school on October 20, 1977, he did not attend open house on that date. N.T. 104.

33. Dr. Pavlovich testified that Micklow neither sought his prior permission nor even gave him advance notice that he would not attend the open house. N.T. 105.

34. Micklow received a written reprimand for his failure to attend the open house. N.T. 108. Administration Exhibit 27.

35. Micklow testified that he had obtained Dr. Pavlovich's prior permission to be absent. N.T. 363-364.

36. Micklow also testified that he informed the other two sixth grade teachers, Mr. Ross and Miss Burik (now Mrs. Ryznar) that he would not attend open house. N.T. 375.

37. Both Ross and Ryznar testified that Micklow had never informed them that he would not attend open house. N.T. 644, 268.

38. There is substantial credible evidence that Micklow failed to attend the October 20, 1977, open house without notice or approval.

Charge No. 4

39. Findings of fact 18-37, supra, demonstrate insubordination in Micklow's repeated failure to obtain prior permission for leaving early and failure to attend open house.

Charge No. 5

40. The District Collective Bargaining Agreement requires advance approval of the principal or immediate supervisor for a professional employee to drive students and further requires all professional employees who drive their cars for school business to have on file at the district administrative office a certificate of insurance of public liability and property damage. N.T. 13, 14. Administation Exhibit 2.

41. Micklow did not have such a certificate of insurance on file for the 1978-79 school year. N.T. 15.

42. On May 30, 1979, Dr. Pavlovich observed Micklow drive out of the school parking lot with three students in his car. Dr. Pavlovich testified that he had not given prior approval. N.T. 91-92

43. Micklow admitted driving the three students in his car. His testimony gave no indication of having sought prior approval, nor did he indicate having a certificate of insurance on file. N.T. 374-375.

44. Dr. Pavlovich distributed to all teacher two bulletins discouraging car pools. The first stated, "The school district solicitor has indicated that we are not permitted to encourage parents to use cars for field trips." The second stated, "Except for kindergarten, when carpools are a necessity, children, especially those for whom a bus has been provided, should not be transported to and from school by automobiles." N.T. 114, 115. Administration Exhibit 28 and 29.

45. Micklow acknowledged scheduling a volleyball game at another school for May 30, 1979, and setting it up so that he and two parents would drive the students in carpools. N.T. 482-488.

46. Although there is a dearth of evidence regarding the 1977-78 school year, there is substantial credible evidence that Micklow transported students and encouraged parent carpools on May 30, 1979.

Charge No. 6

47. Dr. Pavlovich established a system whereby he and a ticket seller would visit each classroom to sell tickets to an outing to Kennywood Amusement Park. N.T. 118-119. Administration Exhibit 30.

48. On May 17, 1979, Micklow did not follow this procedure, but rather collected his students ticket money himself in one envelope which he took to the office. N.T. 119, 379.

49. This resulted in Dr. Pavlovich having to do extra work and in Micklow's class coming up $4.00 short in tickets (which were replaced). N.T. 119-120, 380.

50. There is substantial credible evidence that Micklow failed to follow directives relating to the collection of money from students on May 17, 1979, which resulted in a small amount of student funds being lost.

Charge No. 7

51. One former student of Italian extraction testified that Micklow called her a "dago" several times in front of other students the preceding year, and that he done the same with another student of Italian extraction. N.T. 38-40.

52. The student also testified that she had heard Micklow mimick an Italian accent when addressing the other student in the presence of the class. N.T. 39-40.

53. Two former students testified that Micklow had referred to them and other girls as "sex pots" during the 1977-78 school year. N.T. 42, 253.

54. Dr. Pavlovich testified that Micklow referred to two students as "groundhogs" in their presence in February 1979. N.T. 124-125.

55. There is substantial credible evidence that Micklow made negative and unprofessional comments to elementary school students during the 1977-78 and 1978-79 school years.

Charge No. 8

56. Dr. Pavlovich testified that Micklow ignored his instructions in June 1978 that all children were to be allowed to go on a field trip, that instead Micklow sent five or six children to the principal's office, that he called in Micklow and told him that the children would go on the trip, that Micklow became very irate and told him "To hell with you" in front of parents, children and the school secretary. N.T. 126-130.

57. Micklow acknowledged discussing this incident with several parents. N.T. 503-506.

58. Dr. Pavlovich testified that Micklow repeatedly ignored his directive of December 7, 1978, prohibiting students from using the pay phone to call home during the day and that Micklow

told him in the presence of children that he should have more to do than worry about children making phone calls. N.T. 98-99, Administration Exhibit 24.

59. There is substantial credible evidence that Micklow made unprofessional and derogatory remarks in the presence of students and parents concerning the principal during the 1977-78 and 1978-79 school years.

* * *

60. On August 2, 1979, after closing statements by both sides, the seven Board members present each stated that he or she had been present at each hearing session or had read the transcripts from any session missed. All seven voted to terminate Micklow's contract for persistent and willful violation of the school laws of the Commonwealth of Pennsylvania. This constituted a majority of the nine member Board. No findings of fact were adopted. N.T. 815-818.

DISCUSSION

This Appeal presents nine issues:

A. Does the evidence support either of the statutory grounds for dismissal?

B. Was Micklow's dismissal punishment for filing a union grievance, and which side has the burden of proof on this question?

C. Were Micklow's statutory, contractual or due process rights violated by the principal's keeping material concerning him in a file separate from his personnel file which material was subsequently used to substantiate charges against him?

D. Were the rules on leaving school early vague and discriminatorily enforced in violation of Micklow's statutory, due process or equal protection rights?

E. Were Micklow's statutory or due process rights violated by the failure of the school board to have two-thirds of its members present for each hearing and to require a two-thirds vote of members who had heard all the testimony?

F. Did the Board err in permitting hearsay testimony regarding the golfing incident?

G. Is the Board estopped because of the lapse of time between the occurrence of some of the acts alleged in the charges and the filing of those charges, or by Micklow's satisfactory ratings?

H. Did the Board err in failing to make findings of fact?

I. Did the Board err in failing to rule on various motions and objections made by Micklow's counsel?

A. DOES THE EVIDENCE SUPPORT THE STATUTORY GROUNDS FOR DISMISSAL?

As set forth in detail in the Findings of Fact, supra, the evidence abundantly supports the charges against Micklow relating to the 1977-78 and 1978-79 school years. The incidents were numerous and some of them very serious.

The incidents may be characterized as: repeated misuse of leave or absence without permission (the golf date on sick leave, failure to attend open house, frequently leaving school during the school day); failure to follow administrative directives (sick leave, early leave, open house, personally transporting students, encouraging car pools, improperly collecting student funds); verbal abuse of students ("dago", mimicked Italian accent, "sex pot", "groundhogs"), and verbal abuse of principal in front of students and parents.

Repeated incidents of abuse of leave warrant dismissal for persistent and willful violation of the school laws. Lucciola v. Commonwealth of Pennsylvania, Sec. of Education, 25 Pa. Commonwealth 419, 360 A.2d 310 (1976). Even a two day abuse of leave may warrant dismissal for persistent negligence and immorality. Board of Sch. Directors of Riverside Beaver County v. Howe, 37 Pa. Commonwealth Ct. 241, 389 A.2d 1214 (1978).

Failure to attend open house can also constitute negligence and persistent and willful violation of the school laws. Johnson v. United School District, 201 Pa. Super 375, 191 A.2d 897 (1963).

Failure to obey directives of the administration (regarding leaving school early, personally transporting students without a certificate of insurance, encouraging carpools, improperly collecting student funds, etc.) also constitutes persistent and willful violation of the school laws. Harris v. Commonwealth Sec. of Education, 29 Pa. Commonwealth Ct. 625, 372 A.2d 953, 957, (1977).

Calling students derogatory names also warrants dismissal. This was found to constitute cruelty and immorality in Bovino v. Bd. of Directors of Indiana School District, 32 Pa. Commonwealth Ct. 105, 377 A.2d 1284 (1977). In this regard we note that the statement of charges need only set forth the acts warranting dismissal, not the statutory grounds. See Lucciola v. Commonwealth, Secretary of Education, supra.

Using abusive language to a superior and defying him in front of students also will support dismissal for persistent and willful violation of the school laws. Spano v. School District of Brentwood, 12 Pa. Commonwealth Ct., 170, 316 A.2d 162 (1974).

In short, the charges and the evidence supporting them clearly warrant dismissal. Indeed, several of the charges, taken by themselves, would independently warrant dismissal.

B. RETALIATION FOR FILING GRIEVANCE

Appellant Micklow argues that his dismissal proceeding was initiated in retaliation for filing a union grievance against the principal and, further, that the District should have the burden of proving that the dismissal was not retaliatory.

At the outset, we note that we do not believe that the Secretary of Education has jurisdiction to rule on this retaliation charge. There can be little question that instituting a dismissal in retaliation for filing a grievance constitutes an unfair labor practice as defined in the Public Employe Relations Act, Act of July 23, 1970, P.L. 563, No. 195, 43 P.S. §1101.1201(a)(4). Under that Act, the Pennsylvania Labor Relations Board has exclusive power to prevent unfair labor practices. 43 P.S. §1101.1301.

The Pennsylvania Supreme Court has held:

> . . .'while this provision speaks directly to preventing, as distinguished from determining the occurrence of an unfair labor practice, we think the latter function is implicitly embraced in the former.' Building Service Employees International Union, local 252 v. Schlesinger et al., 440 Pa. 448, 452, 269 A.2d 894, at 896 (1970). Thus, if a party directly seeks redress of conduct which arguable constitutes one of the unfair labor practices listed in Article XII (Section 1201) of the PERA, 43 P.S. §1101.1201 (Supp. 1976), jurisdiction to determine whether an unfair labor practice has indeed occurred and, if so to prevent a party from continuing the practice is in the PLRB, and nowhere else. (citations omitted) Hollinger v. Department of Public Welfare, 469 Pa. 358, 365 A.2d 1245 (1976).

In the interest of judicial and administrative economy, however, we note briefly that we see no merit to either Micklow's procedural or substantive arguments on this point.

Micklow cites no authority for his novel proposition that the District has the initial burden of proof to show that the dismissal proceedings were not retaliatory. Although the burden is on the school board to prove the basis of charges on which it has dismissed the employee, the burden then shifts to the employee to show that the true reason was retaliation. It was not incumbent upon the board to introduce into the record a refutation of Micklow's unsupported charge that the dismissal proceeding was retaliatory. See Spruce Hill Township School District v. Bryner, 148 Pa. Super. 549, 25 A.2d 745 (1942).

Micklow argues that the burden of proof should lie with the District because allegedly his counsel was prevented at the hearing from proving retaliation. Yet the very passages in the transcript which Micklow cites in his brief indicate that, when asked, his counsel repeatedly declined to indicate in any way that he was bringing up the grievance in an effort to demonstrate retaliation. The record simply does not support the contention that he was prevented from going forward with his burden of proof.

Finally, the record contains no evidence of a retaliatory firing. Rather, it reveals a teacher who increasingly engaged in a course of conduct of negligence and open violation of school policies, who was properly terminated at the end of the second year of this pattern of misconduct.

The evidence of his wrongdoing is copious; his eleventh hour filing of an unfounded grievance will not prevent his rightful termination.

C. USE OF MATERIAL NOT KEPT IN PERSONNEL FILE

Micklow asserts that his contractual, statutory and due process rights were violated by the principal's keeping material concerning him in a file separate from his personnel file which material was subsequently used to substantiate charges against him. He cites no statute or due process case law in support of this proposition; nor do we find any statutory or due process violation. In the latter regard, we note Micklow's admission that

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he was given access to all these materials prior to the hearing. See Finding of Fact No. 11. It is also clear from the transcript that Micklow was made aware of the principal's displeasure with his acts at the time they occurred.

Micklow cites Article Four, Clause F of the Collective Bargaining Agreement as the contractual basis of his argument. As set forth in the preceding section of this Opinion, his proper remedy was to grieve an unfair labor practice if he felt that the Agreement was violated.

We certainly do not mean to approve the policy of an administrator keeping derogatory material on a professional employee other than in his personnel file. We see no legitimate purpose served by this practice. Since, however, it violates no statutes, nor constitutional rights, nor makes the dismissal arbitrary, discriminatory or founded or improper considerations, it simply does not rise to the level of vitiating the dismissal.

D. RULES ON LEAVING SCHOOL EARLY

Contrary to Micklow's testimony, the overwhelming evidence presented by numerous faculty members was that Dr. Pavlovich's policy was always that one needed his prior permission to leave school early. See especially Finding of Fact No. 29. There is simply no credible evidence that the policy was vague or discriminatorily enforced. Its enforcement against Micklow was proper and consistent.

E. BOARD ATTENDANCE AT HEARINGS

Micklow asserts that two-thirds of all Board members had to be present at each session, and also that he can only be terminated by a two-thirds vote of board members who were actually present at all hearing sessions.

It is noteworthy that the record reveals no objection made at any time by Micklow to the constitution of the sitting Board. Moreover, there is no requirement that two-thirds of all Board members be present at each session. Penzenstadler v. Avonworth School District, 43 Pa. Commonwealth Ct. 571, 403 A.2d 621 (1979); Boehm v. Bd. of Education of School District of Pittsburgh, 30 Pa. Commonwealth Ct. 468, 373 A.2d 1372 (1977).

Micklow likewise is in error in asserting a requirement that all voting Board members had to be present at each session. Board of Public Education of School District of Pittsburgh v. Pyle, 37 Pa. Commonwealth Ct. 386, 390 A.2d 904 (1978).

F. HEARSAY TESTIMONY

Micklow alleges that his hearing before the Board was defective because the Board admitted one statement of hearsay concerning one of the charges against him during the course of testimony that took 756 pages to transcribe. There was substantial evidence in support of this charge (golfing on a sick leave day). See Findings of Fact 12-19.

Even if Micklow is correct in categorizing the challenged statement as hearsay, he is incorrect in his conclusion that it was inadmissable:

> It is well established that hearsay evidence supportive of other evidence may be admitted in proceedings before administrative agencies (citation omitted) Bd. of Public Education of School District of Pittsburgh v. Pyle, ibid.

G. ESTOPPEL

Mickow argues that the Board is estopped from dismissing him because of the passage of time between the occurrence of some of the acts alleged in the charges and the filing of the charges, and because he always received satisfactory ratings.

The status of the doctrine of estoppel as it applies to school districts is somewhat unclear. In Grippo v. Dunmore School Board, 27 Pa. Commonwealth Ct. 507, 365 A.2d 678 (1976) it was held that a district is not estopped from defending against a contract because it made payments under the contract. Subsequently, the Pennsylvania Supreme Court at least limited the ability of governmental units to avoid estoppel in Commonwealth Dept. of Public Welfare v. UEC, Inc., 483 Pa. 503, 397 A.2d 779 (1979). The Court did require that "all of the traditional elements of

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estoppel have otherwise been established".

Micklow neither pleads detrimental reliance in his Appeal, nor do the facts indicate that such reliance would have been reasonable and justified. Furthermore, in light of his violations of written directives, direct orders, and provisions in the collective bargaining agreement, he cannot be heard to say that he lacked knowledge or the means of knowledge of the facts. In short, his pleadings and the record simply fail to establish the elements of estoppel. See Cheltenham National Bank v. Snelling, 230 Pa. Super. 498, 326 A.2d 557, 560 (1974).

We note that almost all of the allegations concerning Micklow arose out of the school year just ended and the preceding one. It is not unusual for a district to give a professional employee the benefit of the doubt after one deficient school year that he will improve in the next. Indeed in incompetency dismissals, where the district only performs yearly evaluations, the professional employee always is given, by law, a second school year to correct the problem.

We also note that, as established by Section 1123 of the Public School Code, the rating system is designed primarily to rate a teacher's competency or incompetency. Micklow was not terminated for incompetency. Hence his satisfactory ratings are irrelevant to the current proceedings.

H. LACK OF FINDINGS OF FACT

Micklow alleges reversible error in the Board's failure to adopt findings of fact. Although such findings would have certainly been helpful to all parties on appeal and the Secretary of Education, it has been repeatedly held that school boards have no legal obligation to make them. Penn-Delco School District v. Urso, 33 Pa. Commonwealth Ct. 501, 382 A.2d 162 (1978), Grant v. Board of School Directors, 43 Pa. Commonwealth Ct. 556, 403 A.2d 157 (1979).

I. FAILURE OF BOARD TO RULE ON MOTIONS AND OBJECTIONS.

Micklow asserted in his Petition of Appeal that the Board erred in not ruling on various motions or objections during the hearing, and that therefore he does not know on what basis the Board reached its decision. He does not identify in any way the motions or objections he made, upon which the Board did not rule, to his alleged prejudice. He does not cite any authority for the proposition that the Board must rule on all motions or objections, nor are we aware of any. In light of the copious testimony against him from numerous sources, we find it rather disingenuous for Micklow to suggest that he does not know the basis for his dismissal.

Accordingly, we make the following:

ORDER

AND NOW, this 2nd day of October , 1981, it is hereby Ordered and Decreed that the decision of the School Board of the Fox Chapel Area School District dismissing Appellant on the grounds of persistent and willful violation of the school laws of the Commonwealth and persistent negligence be sustained.

Robt G. Scanlon
Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

RUTH S. GRANT, Appellant	:	
v.	:	Teacher Tenure Appeal No. 17-79
BOARD OF EDUCATION OF CENTENNIAL SCHOOL DISTRICT, Appellee	:	

OPINION

This appeal has been remanded to the Secretary of Education from the Commonwealth Court in an order vacating the Secretary's opinion issued July 25, 1978. The Commonwealth Court remanded this case to the Secretary of Education for an adjudication, including Findings of Fact consistent with their opinion.

FINDINGS OF FACT

1. Ruth S. Grant, Appellant, is a professional employee. She is a certified guidance counselor and school psychologist. She worked as a guidance counselor in the Hamburg School District, Hamburg, Pennsylvania, for the 1961-62 school year. She then worked for four years in the Conrad Weiser Area School in Robesonia, PA. She then accepted an internship in the Wernersville State Hospital in the summer of 1966 and, subsequently, worked there as a staff psychologist. In March 1972, Appellant began her employment in Centennial School District as a school psychologist. She also

worked as a teacher in the evening adult education program at the district. [N.T. 357a, 361a - 365a, 28a].

2. The Centennial School District is a large school district located in Bucks County, with an enrollment of over 1,400 students and a staff of approximately 800 professional employees. During the 1974-75 school year, the school district's Office of Pupil Personnel Services had a staff consisting of six psychologists, including Appellant. [N.T. 8a - 10a].
3. On June 13, 1975, Appellant was informed by her supervisor, Dr. N.M. Andrews, that she would be given an unsatisfactory rating. Although Dr. Andrews had mentioned to Appellant certain concerns about her work in previous discussions, this was the first notice that her work was considered to be unsatisfactory. [N.T. 466a].
4. On June 24, 1975, Appellant was told by Dr. Everett A. McDonald, Jr., Superintendent of Schools, that she could resign or have charges for dismissal preferred against her. Appellant declined to resign. [N.T. 16a - 18a].
5. On July 11, 1975, Dr. McDonald met with Appellant and gave her an unsatisfactory rating on the standard state form, DEBE 333. Attached to the rating was an anecdotal record prepared by Dr. Andrews, which was dated July 8, 1975. [N.T. 20a].
6. The unsatisfactory rating Appellant received on July 11, 1975, was the only rating she had received during the course of her employment in the Centennial School District. [N.T. 39a].
7. Appellant's supervisor, Dr. Andrews, was first employed by the Centennial School District on December 2, 1974, as Supervisor of Special Education and Special Services. She was certified at that

time as a school nurse, school psychologist and guidance counselor. In June 1975, based on application materials submitted in May 1975, she was issued the following supervisory certificates: Supervisor of School Health Services, Supervisor of Pupil Personnel Services, Supervisor of School Psychological Services, and Supervisor of School Guidance Services.

8. By letter dated August 1, 1975, Appellant was informed that charges for her dismissal had been brought and that a hearing on the charges would be held August 12, 1975. The Statement of Charges was signed by the President and attested to by the Secretary of the Board of Directors of the Centennial School District (hereinafter School Board). Appellant was charged with immorality, incompetency, persistent negligence, persistent and willful violation of the school laws and intemperance. Under each charge were a number of counts, some of the counts related to more than one charge. [N.T. 501a].

9. Hearings on the charges were held before the School Board on August 12 and 20, 1975, at which evidence was presented regarding Appellant's poor performance as a psychologist. [N.T. 76a, 90a - 95a, 106a - 112a, 122a - 125a, 128a, 130a - 135a, 155a].

10. On August 26, 1975, the School Board met and voted on the charges as follows:

    Immorality: 1 Aye, 7 Nays

    Incompetency: 7 Ayes, 1 Nay

    Persistent Negligence: 3 Ayes, 5 Nays

    Persistent and willful violation of school laws: 3 Ayes, 5 Nays

    Intemperance: 1 Aye, 6 Nays

Because only the charge of incompetency had been sustained, the Board then voted seven to one to dismiss Appellant for incompetency. Notice of the Board's decision was sent to Appellant by registered mail the following day. [N.T. 506a, 507a].

11. On September 24, 1975, Appellant's Petition of Appeal was filed in the Office of the Secretary of Education. A hearing on the appeal was held October 31, 1975.

12. On July 6, 1976, the Secretary of Education (hereinafter Secretary) issued an order and adjudication sustaining the appeal. The sole basis of the Secretary's decision was that the dismissal of Appellant was improper because she received only one unsatisfactory rating during the course of her employment with the Centennial School District, notwithstanding that the Department of Education (hereinafter Department) required that two unsatisfactory ratings must precede a professional employee's dismissal for incompetency.

13. The School Board took a timely appeal of the Secretary's order to the Commonwealth Court (No. 1319 C.D. 1976), alleging interalia that said order was improper because the Department's policy upon which it was based had not been promulgated consistent with the requirements of the Commonwealth Document Law, Act of July 31, 1968, P.L. 769 as amended, 45 P.S. §1101 et. seq. and was, therefore, not binding on the School Board.

14. The Department responded, arguing that the Secretary's decision had been proper. Appellant intervened arguing on the merits of her initial appeal to the Department that she had received only one unsatisfactory rating prior to her dismissal for incompetency.

15. On August 9, 1977, the Commonwealth Court held that the Secretary's order of July 6, 1976, was an error of law since the Department's policy that two unsatisfactory ratings must precede a teacher's dismissal for incompetency had not been promulgated as required by Sections 207 and 208 of the Commonwealth Documents Law, 45 P.S.§§207, 208. Additionally, the court held that because the Secretary did not decide the merits of the School Board's actions, the matter would be remanded for a decision on the merits.

16. On July 25, 1978, the Secretary of Education issued an Opinion and Order vacating the Opinion and Order of the Secretary of Education dated July 6, 1976, No. 274 and upholding the decision of the Board of School Directors of the Centennial School District, Bucks County, dated August 27, 1975, dismissing Appellant.

17. Appellant timely filed an appeal of the July 25, 1978 order of the Secretary of Education with the Commonwealth Court. Appellant made three points in this further appeal. First, she contended that the Secretary abused her discretion in declining to provide a further hearing in which Appellant could present evidence as requested. Second, Appellant complained that the unsatisfactory rating given her shortly before the charges which led to her dismissal should have been disregarded with the result that she could not be held to have been lawfully dismissed. Appellant asserted that it was an abuse of the Secretary's discretion or an error of law for the Secretary to find against Appellant and uphold the School District's dismissal of Appellant in view of the expression by the predecessor Secretary of Education in his decision made two years earlier that the same rating lacked integrity. Third, Appellant complained that

the Secretary of Education misconceived her function in that instead of making Findings of Fact and adjudicating the matter on the merits as were proper, she reviewed the record to see whether it contained substantial evidence supporting the School Board's conclusion that Appellant was an incompetent professional employee.

18. The Commonwealth Court found that Appellant's third point was of merit in that the record as submitted to the Commonwealth Court was without findings of fact on the merits by either the School Board or the Secretary of Education.

19. The Commonwealth Court stated that it was unable to review matters coming to it from an administrative agency if there are no findings of fact on the merits. The Court held that the Secretary of Education as the ultimate fact finder in cases of this nature, must issue findings of fact on the remaining matter at issue: Appellant's alleged incompetency. The Commonwealth Court order, dated June 27, 1979, vacated the Secretary of Education's opinion of July 25, 1978 and remanded the record to the Secretary of Education for an adjudication, including findings of fact consistent with the Commonwealth Court opinion.

20. Upon further review of the record, the Secretary of Education makes the following findings of fact as supported by substantial evidence:

    A. Appellant's immediate supervisor, Dr. Andrews, testified that Appellant's work product consisting of the initial 20 psychological reports that she had written, was a disgrace. [N.T. 92a].

    B. Other psychologists in the department refused to cosign any of Appellant's psychological reports; cosigning by a fellow psychologist is required as part of departmental policy. [N.T. 92a]. The department experienced no other instance of a colleague refusing to cosign another's report. All of Appellant's colleagues refused to sign her reports. [N.T. 86a].

C. Appellant's inaccurate testing of a special education student resulted in her incorrect recommendation that the student be placed in a regular classroom. The student was in twelfth grade and had been in special education classes all his life. Appellant recommended that he be switched to regular classes for the last five months of his senior year. Appellant's recommendation, if implemented, would have been detrimental to the student's education and would have deprived him of the opportunity to attend postgraduate classes. [N.T. 101a - 104a].

D. Appellant tested another student by administering an adult Wechsler psychological test instead of the child Wechsler test and failed to provide an adequate summary and recommendation in her report on this child. [N.T. 122a - 125a].

E. Only one of the twenty-six reports prepared by Appellant was deemed to be competent by her superior. [N.T. 135a].

F. Appellant failed to professionally conduct two psychiatric consultations; making no active contribution during such conferences. Typically the psychologist prepares the parents for the meeting with the psychiatrist, reassures them, and gives the psychiatrist all the pertinent information and input concerning the student. Appellant merely provided written reports to the psychiatrist but made no verbal contribution during the consultations. [N.T. 155a - 157a].

G. Appellant failed to test a particular student and attempted to update past test results that were two years old instead and present it as current. Every Centennial Special Education student must be retested every two years as mandated by Pennsylvania Department of Education. [N.T. 130a - 131a].

H. Within one month, Appellant changed her own recommendation that a mentally retarded student should be assigned to a regular classroom. The initial decision of Appellant to "mainstream" this child was based on results from improper testing administered by the Appellant. Appellant first scored the child with a "91", a score indicating average intelligence on the Stanford Binet Standard IQ test. When told to retest the child, Appellant scored the child with a "66", a score indicating the child was borderline mentally retarded. [N.T. 112a - 121a].

I. Dr. Andrews repeatedly approached Appellant on matters of improper tests and other areas in which Appellant needed improvement. Appellant continued to improperly test students; her work product continued to be incompetent. [N.T. 300a - 321a].

DISCUSSION

This case has been remanded to the Secretary of Education for an adjudication, including findings of fact, consistent with the opinion of the Commonwealth Court. Grant v. Board of Directors of the Centennial School District, 43 Pa. Commw. Ct.556, 403 A.2d 157 (1979). Justice Rogers held:

> Order:
>
> AND NOW, this 27th day of June, 1979, the Order of the Secretary of Education made July 25, 1978 is vacated and the record is remanded to the Secretary of Education for an adjudication, including findings in fact, consistent with this opinion.

Id. at _________, 160.

The language of the above Order does not require the Secretary to conduct a rehearing regarding this matter. A review of the instant record consisting of some 514 pages of testimony, exhibits and briefs indicates it is complete. The parties were provided ample opportunity to raise and litigate all relevant questions of fact and law. Appellant's December 3, 1980 request for a hearing to present expert testimony on the standard of Appellant's performance as a school psychologist is therefore denied. The Commonwealth Court, denied Appellant's prior request for a rehearing stating that:

> [Appellant] testified at length on both direct and cross-examination as to the merits, and at one place or another she refuted or explained every significant incident or circumstance depended on by the School Board as evidence of incompetency. At the conclusion of the hearing, Mrs. Grant's able counsel summed up on the merits with considerable vigor . . . there is no suggestion whatever in the record of the hearings, which we have read with some care, that the Appellant's counsel was proceeding lightly on the merits. His cross-examination of the School Board's witnesses was thorough to a fault and his objections numerous.

Id. at________, 158.

Pennsylvania Administrative Agency Law is clear that when a court decides an Order by a government agency is improper due to an error of law, it may require further administrative action to determine if the

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proper decision can be made on the merits from the total record. Klingensmith v. Department of Labor and Industry, 1 Pa. Commw. Ct. 204, 273 A.2d 920 (1971). We find that the Secretary can make a final adjudication, complete with findings of fact on the merits, from the record as it now stands.

The Secretary's duty in promulgating an order is to set forth the findings of fact which are essential to the validity of such order. These findings must be sufficiently specific to enable the court in reviewing that action to pass upon questions of law. Grant, supra., Gottshall v. Blatt, 71 DAUPH 383 (1959). Sections 507, 704 of the Administrative Agency Law, 2 Pa. C.S. §§507, 704. Such administrative findings must be based upon the evidence and should state the factual situation clearly and unequivocally. Appeal of Veterans Club of Shopa Davey Home Association of Blakely, 50 Lack Jr. 29 (1949). However, the Secretary functioning as an administrative determinator of fact is not required to set forth findings specifically noting the rejection, and reasons for such rejection, of each and every minor allegation raised at the dismissal hearings of the Appellant. Application of Midwestern Fidelity Corp., 26 Pa. Commw. Ct. 211, 363 A.2d 892 (1976).

Appellant, in the instant case, was employed as a school psychologist for the Centennial School District. On June 13, 1975, Appellant was informed by her supervisor, Dr. Andrews, that she would be given an unsatisfactory rating. [F.F.No. 3]. On July 11, 1975, Appellant was given an unsatisfactory rating on the standard DEBE 333 form. By letter dated August 1, 1975, Appellant was informed that charges for her dismissal had been brought and that a hearing on the charges would be held on August 12, 1975. Appellant was charged with immorality, incompetency, persistent negligence, persistent and willful violation of school laws and intemperance. Hearings were held on the charges before the School Board on August 12 and August 20, 1975 during which evidence was presented regarding Appellant's poor performance as a school psychologist. On August 26, 1975, the School Board voted to dismiss Appellant for incompetency. The question now before the Secretary is whether the record contains evidence upon which findings of fact on the merits can be made to uphold the Centennial School District's dismissal of Appellant. The Secretary finds the record contains such evidence.

The test in administrative agency law regarding substantial evidence requires that the findings of fact necessary to support an adjudication must be supported by more than a scintilla and must do more than create a suspicion of existence of the fact to be established, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. A.P. Weaver v. Sanitary Water Board, 3 Pa. Commw. Ct. 499, 284 A.2d 515 (1971).

The Weaver decision was applied to the Appellate review of the School Board's adjudication in Landi v. West Chester Area School District, 23 Pa. Commw. Ct. 586, 353 A.2d 895 (1976). In Landi, the Commonwealth Court declared that the substantial evidence necessary to justify dismissal is determined by whether a reasonable man acting reasonably might have reached the same decision reached by the board.

Applying the above test to the record, Dr. Andrews, Appellant's immediate supervisor, testified that Appellant's work product (the initial 20 psychological reports that she had written) was a disgrace.

[F.F. 20A]. In explaining this conclusion, Dr. Andrews stated that none of the other staff psychologists would cosign any of Appellant's psychological reports, thereby directly disregarding departmental policy requiring that all reports must be cosigned. [F.F. 20B].

Appellant repeatedly inaccurately tested students which resulted in her incorrect recommendations that these students be placed in regular classrooms. [F.F. 20C]. In one instance, Appellant inaccurately tested a special education student and requested that the student be placed in a regular classroom. This particular student was in the 12th grade and had been in special education classes all of his life. Appellant recommended that this student be switched to regular classes for the last five months of his senior year. This recommendation, if implemented, would have been detrimental to the student's education. This student was reading on approximately a first grade level at the time of Appellant's recommendation that the child be mainstreamed. Further, such mainstreaming would in this case have denied the student the opportunity to participate in appropriate special education programs until the age of 21. [F.F. 20C].

Appellant evaluated another student by administering an adult psychological test instead of the child version of that test and also failed to provide an adequate summary and recommendation in the report on this child. [F.F. 20D]. In yet another instance, within one month Appellant changed her own recommendation that a mentally retarded student should be assigned to a regular classroom. Appellant's initial decision to try to mainstream this child was based on the results of improper testing once again administered by the Appellant. Appellant tested the student with the Stanford BINET Standard IQ test. Appellant first scored the child with a "91", a score indicating average intelligence. When told by her superior to retest this child, Appellant scored the child with a "66", a score indicating the child was borderline mentally retarded. [F.F. 20H].

Appellant also failed to professionally conduct two psychiatric consultations. As the school psychologist, it was part of Appellant's job duties to participate in psychiatric consultations between parents and psychiatricts regarding certain school students. During the two psychiatric consultations in question, Appellant made no active contribution. Typically, it is the role of the school psychologist to prepare the parents for the meeting with the psychiatrist. This is done in order to reassure the parents as well as to give the psychiatrist all the pertinent information and input concerning the particular student. During the consultations in question, Appellant merely provided written reports to the psychiatrist and made no verbal contribution whatsoever. [F.F. 20F].

Dr. Andrews repeatedly approached the Appellant on matters of her improper testing of students as well as other areas in which she felt Appellant needed improvement. Appellant continued to improperly test students and her work product continued to be incompetent. [F.F. 20I]. Dr. Andrews testified before the school board that only one of the twenty-six reports prepared by the Appellant was competent. [F.F. 20E].

We find that Appellant's repeated inability to correctly test her students, her failure to improve her job performance upon her superior's repeated requests to do so, and the fact that only one of the twenty-six reports prepared by the Appellant was deemed to be competent by her superior provides substantial evidence to uphold the Centennial School

District's decision to dismiss the Appellant for incompetency.

Accordingly, we make the following:

ORDER

AND NOW, this 10th day of August, 1981 it is ordered and decreed that the appeal of Ruth S. Grant from the decision of the Centennial School District is hereby dismissed.

Robt G. Scanlon

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF EDUCATION

Myron L. Fasnacht, :
Appellant :
v. : Teacher Tenure Appeal No. 18-79
Eastern York School District, :
Appellee :

OPINION

Myron L. Fasnacht, Appellant herein, has appealed from the decision of the Board of Directors of the Eastern York School District, dismissing him as a professional employee on the grounds of persistent negligence.

FINDINGS OF FACT

1. Myron L. Fasnacht was hired by the Eastern York School District (the District) on September 1, 1970, and was a tenured professional employee of that District teaching English, reading, spelling, social studies, math and science to special education students in the tenth, eleventh, and twelfth grades in the Eastern High School at the time of his suspension without pay on January 4, 1979. N.T. 6,7; Contract of September 1, 1970.

2. Prior to his suspension without pay, Mr. Fasnacht was employed by the District for nine (9) years. N.T. 6, 121.

3. Mr. Fasnacht was suspended without pay by District Superintendent, Thomas Jenkins on January 4, 1979, for persistent negligence and incompetence. N.T. 9.

4. By letter of January 12, 1979, the Board of Directors of the Eastern York School District (the Board) informed Mr. Fasnacht of the specific charges against him and scheduled a hearing for January 24, 1979. Letter of January 12, 1979, Board to Fasnacht.

5. The list of charges was divided into two categories: persistent negligence and incompetence. All eight allegations in the persistent negligence category related to alleged sleeping in class. The twenty-three allegations in the incompetence category related to lesson plans, individualized education plans (IEP's), subject matters being taught, teaching methods, and Mr. Fasnacht's evaluations on the DEBE 333 form for 1972-73, 1973-74, 1974-75, 1975-76, 1976-77, and 1977-78. Letter of January 12, 1979, Board to Fasnacht.

6. A hearing was held January 17, 1979, and February 20, 1979. By agreement, the deposition of Mr. Fasnacht's rheumatologist, Dr. Marlin E. Wenger, was taken June 14, 1979. Oral argument was subsequently heard before the Board. On October 9, 1979, by a vote of 6-Yes, 2-No, 1-Absent, the Board adopted findings of fact and, based on those findings, upheld Mr. Fasnacht's dismissal on the grounds of persistent negligence. N.T. 1; Deposition of Marlin E. Wenger, Board Minutes October 9, 1979; Adjudication of Board.

7. At Mr. Fasnacht's hearing, the Administration did not offer into evidence Mr. Fasnacht's official DEBE 333 rating forms, and objected to Mr. Fasnacht's offering these forms into evidence.

Over these objections, his ratings for the school years 1974-75 1975-76, 1976-77, and 1977-78 were admitted. For all these years, Mr. Fasnacht was rated overall satisfactory. N.T. 125-126; Teacher's Exhibits Nos. 1,2,3, and 4.

8. For all the school years listed above, Mr. Fasnacht received satisfactory ratings in all categories including, but not limited to "habits of conduct," "planning and organization," "individualization," "classroom generalship," "manipulation of materials," "normal development" (of pupils), and "subject matter progress" (of pupils). Teacher's Exhibits Nos. 1,2,3, and 4.

9. After the close of the administration's case, its attorney conceded, "We have not put forth any evidence on incompetency." N.T. 126.

10. Testimony at the hearing was limited to four subjects: allegations that Mr. Fasnacht's individual education plans for 1977-78 were inadequate and had to be corrected by him, allegations that Mr. Fasnacht failed to submit lesson plans to the office on several occasions in 1976-77, allegations that Mr. Fasnacht did not teach his pupils in accordance with their IEP's, and allegations that Mr. Fasnacht was repeatedly observed sleeping in class.

11. The Board did not find any deficiency in Mr. Fasnacht's preparation of IEP's. Adjudication of Board, October 9, 1979.

12. Mr. Fasnacht failed to submit lesson plans to the office in timely manner for the weeks beginning October 25, November 1, November 9, and November 22, 1976; January 26, February 8, and March 7, 1977. N.T. 111.

13. Beginning the 1977-78 school year, Mr. Fasnacht was no longer required to prepare and submit lesson plans because, as a teacher of special education, he had to prepare IEP's instead. N.T. 21.

14. Assistant Superintendent Jean N. Zimmerman testified that Mr. Fasnacht did not teach in accordance with his pupils' IEP's in 1977-78 and 1978-79. N.T. 57-58.

15. Ms. Zimmerman never personally observed Mr. Fasnacht teaching, but rather based her conclusions on two observations by others in 1977-78 and one in 1978-79. N.T. 60-61.

16. Each of the three actual classroom observations was of a social studies class. N.T. 59.

17. Ms. Zimmerman alleged Mr. Fasnacht's deficiency in 1977-78 as follows:

> "In comparing the IEP's for 1977-78, the IEP's all call for instruction in Social Studies to be in the area of the United States. I found absolutely nothing in any of the classroom observations on that subject." N.T. 57-58.

18. When cross-examined on the first classroom observation in 1977-78 and asked what topic was being taught, Ms. Zimmerman responded:

> "It was American history from the standpoint of the Civil War and the Industrial Revolution and the factory system." N.T. 60.

19. Ms. Zimmerman's conclusion that Mr. Fasnacht's teaching in 1978-79 did not follow his pupils' IEP's was based on one classroom observation by Assistant Principal Charles Vanderwater. N.T. 61.

20. Mr. Vanderwater testified that he observed Mr. Fasnacht teach a social studies class that included lessons on democracy, early exploration, and an assignment concerning the writing of the Constitution. N.T. 93-94.

21. Mr. Vanderwater testified that Mr. Fasnacht was not following his pupils' IEP's, and that none of the subjects taught was proper in view of any of the IEP's for his special education students., N.T. 93-94.

22. On cross-examination, Mr. Vanderwater conceded that he had not reviewed the pupils' IEP's before he made his classroom observation and written critique of Mr. Fasnacht's teaching. N.T. 95.

23. On further cross examination of Mr. Vanderwater, the following exchange occurred:

> Q. "How did you know whether or not he was following the IEP's when you hadn't in fact even looked at the IEP's when you made your observation?
>
> (No response.)
>
> Q. You didn't know whether he was following them or not, did you?
>
> A. It was irrelevant at that time." N.T. 96.

24. There is neither credible nor substantial evidence to support the Board's finding that:

> "On a number of occasions Mr. Fasnacht was observed teaching subjects totally inconsistent with individual education plans." (Adjudication of Board, October 9, 1979, Finding of Fact No. 18).

25. The Board found that Mr. Fasnacht "was observed sleeping" in class twice during the week ending March 10, 1977; on May 16, 1978; on October 2, 1978; on October 31, 1978; and on January 3, 1979; and that "he was observed with his head slumped over at his desk and his eyes closed in his classroom during late November 1978." Adjudication of Board, October 9, 1979, Findings of Fact, Nos. 4,5,6,7,8,10 and 9.

26. On none of the occasions of alleged sleeping was Mr. Fasnacht not sitting at his desk, nor was he heard to snore, nor was he ever physically awakened by anybody.

27. Although it is clear that Mr. Fasnacht denied the allegation of sleeping on at least one occasion, there is conflicting testimony as to whether he did so on other occasions. N.T. 11, 129, 157. As developed below, he was not confronted with the accusation of sleeping on several of these alleged occasions.

28. One administration witness testified that Mr. Fasnacht has a flaccid apperance, is corpulent, and acknowledged that Mr. Fasnacht has "hooded eyes" in that "when he looks at you, you find that you're looking at his eyelashes." N.T. 103-104.

29. Mr. Fasnacht's rheumatologist, Dr. Wenger, stated in his deposition that he has prescribed allopurinol for Mr. Fasnacht, that allopurinal is reported to have caused drowsiness in a few patients, that it is possible that Mr. Fasnacht experienced drowsiness as a result of taking allopurinol, but that he has

no way of knowing whether it has induced drowsiness in Mr. Fasnacht. Deposition of Marlin E. Wenger, pp. 4, 6, 15.

30. John Manley, then Assistant Principal, testified that, while making routine checks of the building, he had twice observed Mr. Fasnacht sleeping in his room in March 1977. N.T. 71.

31. Mr. Manley observed Mr. Fasnacht from outside his room and did not enter it. N.T. 71, 78.

32. Mr. Fasnacht did not have his head down when Mr. Manley observed him. N.T. 78.

33. At the hearing before the Board when Mr. Fasnacht assumed the same position relative to Mr. Manley as in March 1977, Mr. Manley testified that his eyes were then closed when, in fact, they were open. N.T. 78-79.

34. In view of the failure of Assistant Principal Manley to enter Mr. Fasnacht's room of mentally retarded students to awaken him if asleep, Mr. Manley's inability to determine in similar circumstance whether Mr. Fasnacht's eyes were open or closed, and Mr. Fasnacht's satisfactory rating for 1976-77, there is no substantial nor credible evidence that Mr. Fasnacht was asleep in his classroom in March 1977.

35. Thomas Jenkins, then Principal, testified that he observed Mr. Fasnacht sleeping in class on May 16, 1978. N.T 10.

36. Mr. Fasnacht was sitting essentially upright at the time of this observation. N.T. 31.

37. When he viewed Mr. Fasnacht in a similar position at the hearing, Dr. Jenkins could not determine when his eyes were open or closed. N.T. 32

38. Although Dr. Jenkins testified on direct examination that he awakened Mr. Fasnacht, on cross examination he stated, "When I approached his desk, I got just about to his desk before he realized that I was there and appeared to awaken." N.T. 10, 32.

39. Mr. Fasnacht testified that he has a chronic hearing problem which probably caused him not to hear Dr. Jenkins until he came near and which has since been ameliorated by a suction procedure performed by a hearing specialist. N.T. 129-133.

40. In light of Dr. Jenkins' inability to determine in a similar position whether Mr. Fasnacht's eyes were open or closed, the fact that Mr. Fasnacht acknowledged Dr. Jenkins' presence without being called to or prodded, and Mr. Fasnacht's satisfactory rating for 1977-78, there is no substantial nor credible evidence that Mr. Fasnacht was asleep in his class on May 16, 1978.

41. Dr. Jenkins, then Superintendent of Schools, testified that he next observed Mr. Fasnacht sleeping in class on October 2, 1978, and that Mr. Fasnacht awakened when he approached his desk. N.T. 10.

42. At the time of this observation, Mr. Fasnacht was at his desk in the rear of the room, sitting upright, not with his hands on his head. N.T. 34.

43. When Mr. Fasnacht assumed a similar position at the hearing, Dr. Jenkins testified that his eyes appeared closed

when, in fact, they were open. N.T. 34-35.

44. In light of Dr. Jenkins' mistaken belief under similar circumstances that Mr. Fasnacht's eyes were closed, there is no substantial or credible evidence that Mr. Fasnacht was asleep in his classroom on October 2, 1978.

45. Superintendent Jenkins and Principal Manley testified that together they observed Mr. Fasnacht asleep on October 31, 1978, while passing his classroom. N.T. 10,70.

46. Although Dr. Jenkins had warned Mr. Fasnacht a month earlier that he would take disciplinary action against him the next time he found Mr. Fasnacht asleep, Dr. Jenkins did not bring this alleged incident to Mr. Fasnacht's attention, record it in Mr. Fasnacht's personnel file nor take any disciplinary action. N.T. 35,36.

47. Although Superintendent Jenkins and Principal Manley both testified that they believed Mr.Fasnacht to be asleep in a room of mentally retarded pupils, they did not even enter the room. N.T. 36.

48. When questioned as to why they did not enter the room, Principal Manley could offer no explanation. N.T. 81

49. In light of the factors cited in Findings 45-47, supra, there is no substantial nor credible evidence that Mr. Fasnacht was asleep in class on October 31, 1978.

50. Principal Manley and Assistant Principal Vanderwater testified that they saw Mr. Fasnacht sleeping at his desk in

class sometime in November of 1978. N.T. 71, 92.

51. This alleged incident was not documented. N.T. 71.

52. Mr. Fasnacht was observed by them for four or five seconds from the hall through a window. N.T. 101, 102.

53. Neither Principal Manley nor Assistant Principal Vanderwater entered Mr. Fasnacht's classroom. N.T. 101-102.

54. When questioned, Mr. Vanderwater could offer no explanation for their failure to intercede. N.T. 102.

55. Neither Mr. Manley nor Mr. Vanderwater discussed this incident with Mr. Fasnacht. N.T. 71, 104.

56. In light of the factors cited in Findings 50-54, there is no substantial nor credible evidence that Mr. Fasnacht was asleep in his classroom in late November 1978.

57. Dr. Jenkins and Principal Manley testified that they observed Mr. Fasnacht asleep on January 3, 1979. N.T. 11, 70.

58. Dr. Jenkins and Mr. Manley did not enter Mr. Fasnacht's room, nor confront him at that time. N.T. 39.

59. In light of the failure of Dr. Jenkins and Mr. Manley to enter Mr. Fasnacht's classroom of mentally retarded children, there is no credible or substantial evidence that Mr. Fasnacht was asleep on January 3, 1979.

DISCUSSION

The basic issues raised on appeal are as follows:

Did the Board err in basing Mr. Fasnacht's discharge on on competency related items (lesson plans and individual education plans)?

Does the evidence support the charge of persistent negligence (sleeping in class)?

Even if Mr. Fasnacht's dismissal was proper, is he entitled to back pay for the period of January 4, 1979 (when he was suspended) to October 9, 1979 (the date of the Board's decision to terminate)?[1]

A. Lesson Plans and Individual Education Plans

Appellant Fasnacht argues that the Board erred in basing his dismissal on his alleged failure to submit lesson plans to the office on occasion in 1976-77 and his alleged failure to teach subjects on his pupils' IEP's.[2] He argues that these are competency related items; that he was at all times rated satisfactory including specifically "planning and organization"; that any deficiency regarding submission of lesson plans in 1976-77 is insignificant and far removed from his discharge in 1979, and that testimony demonstrated that he was properly instructing his students based upon their IEP's.

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[1] Two other issues raised were mere restatements of Issues 1 and 2. Another ("Was the evidence presented fairly . . . ?) was not briefed or argued by Appellant.

[2] Although Appellant argues in his brief that his IEP's for 1977-78 were satisfactorily corrected and that his pupils' instruction was properly individualized, he need not have done so. The Board made no findings on these issues. The Board's only finding of dereliction regarding IEP's was Number 18, that Mr. Fasnacht was observed teaching subjects totally inconsistent with the IEP's.

It is established that Mr. Fasnacht at all times received satisfactory ratings on his DEBE-333 rating form, including satisfactory ratings in "planning and organization." Clearly proper planning and organization are ingredients of teacher competence as demonstrated by their inclusion on the DEBE-333 form. The Board specifically eschewed a finding of incompetency and does not here challenge the Departmental regulation that:

> Two consecutive unsatisfactory ratings of a professional employee are necessary to support a dismissal on the grounds of incompetency. Pa. Bulletin, Vol 8, Nos 34, August 26, 1978.

The Board argues that failure to submit lesson plans does constitute negligence rather than incompetence, citing Davies v. Big Spring School District 15 School Law Information Exchange No. 109 (1978).

There is merit to both sides of this argument. Failure to make proper lesson plans for pupils would be an indication of incompetency. Repeated failure to file copies of those plans in an office could demonstrate negligence.

Nevertheless, Mr. Fasnacht's argument that any negligence regarding lesson plan submissions in 1976-77 is irrelevant to his dismissal in 1979 is compelling. As the administration testified, Mr. Fasnacht's classes of mentally retarded students were not even supposed to have lesson plans beginning with the 1977-78 school year. but rather IEP's. Had there been evidence of failure by Mr. Fasnacht to submit IEP's in 1977-78 and 1978-79, his failure to submit lesson plans in 1976-77 might be part of a pattern of negligence in this general area. However, no such evidence was adduced at the hearing, and the Board made no such finding. Standing by itself, Mr. Fasnacht's failure to submit copies of his lesson plans to the office over a year and a half before he was dismissed, is no cause for dismissal.

The Board argues that Mr. Fasnacht's failure to submit lesson plans in 1976-77 should be coupled with his alleged subsequent failure to follow his pupils IEP's to demonstrate a pattern of persistent negligence. However, there is simply no credible nor substantial evidence to support the Board's only finding regarding IEP's, that Mr. Fasnacht "was observed teaching subject totally inconsistent with (them)."

Two administration witensses testified that Mr. Fasnacht was observed teaching subjects inconsistent with his pupils' IEP's[3]. The first witness, Assistant Superintendent Zimmerman, had never personally observed him teach, based her conclusions on three observations made by other persons, testified that Mr. Fasnacht was not following the IEP's because his Social Studies instruction was not in the area of the United States, and then immediately contradicted herself and stated that he was teaching American history from the standpoint of the Civil War and the Industrial Revolution and the factory system. The second witness, Mr. Vanderwater, testified that he observed Mr. Fasnacht teach subjects inconsistent with his pupils' IEP's, but then acknowledged that he hadn't read the IEP's when he made the classroom observation and his report on that observation and that he deemed the IEP's to be "irrelevant" to his observation of Mr. Fasnacht's class of mentally retarded pupils.

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[3] A third administration witness, Principal John Manley, testified that Mr. Fasnacht taught beyond the level of his students and engaged in group instruction instead of individual instruction. The Board made no finding that Mr. Fasnacht had done so. Mr. Manley did not testify that Mr. Fasnacht taught subjects inconsistent with his pupils' IEP's.

Parenthetically, even if there was any credible, substantial evidence that a special education teacher had, on occasion, taught subjects not on his pupils' IEP's, that would hardly be grounds for dismissal. Certainly there may be times when one area of discussion leads to others, and a teacher should not be faulted for pursuing other topics rather than stifling inquiry. Only if a teacher fails to cover the subject areas on his pupils' IEP's (or lesson plans) should he be disciplined. There is simply a total absence of evidence that Mr. Fasnacht failed to teach his pupils the subject areas they were supposed to learn.

B. Sleeping in Class

Certainly, it would be intolerable for any teacher to fall asleep in class repeatedly, no matter what the reason. The mere accusation of repeated sleeping in the classroom is insufficient, however, to support a teacher's termination. It is upon the administration to present substantial evidence of such persistent negligence. In the instant case, the Board seems to have acted upon the theory that where there's smoke there's fire, rather than to rely upon proof of the charges.

Under Section 1131 of the Public School Code of 1949, the responsibility of the Secretary of Education "after hearing and argument and reviewing all the testimony filed or taken before him" is to "enter such order either affirming or reversing the action of the Board of School Directors as to him appears just and proper." 24 P.S. §11-1131. The actual scope of review under this provision has been given varying interpretations by various Secretaries of Education and the Courts over the years.

At times, the Commonwealth Court has held that a teacher's dismissal must be upheld by the Secretary if there is substantial evidence on the record for doing so, and that the Secretary may not substitute his judgement regarding the credibility of witnesses for that of the School Board, Penn-Delco School District v. Urso, 33 Pa. Commonwealth Court 501, 382 A.2d 162, 167, (1978), Wissahickon School District v. McKown --Pa. Commonwealth Court--, 400 A.2d 899 (April 23, 1979).

More recently, the Commonwealth Court has said:

> ...the Secretary of Education misconceived her funtion (in) that instead of making findingsof fact and adjudicating the matter on the merits as was proper, she reviewed the record to see whether it contained substantial evidence supporting the School Board's conclusion . . .

> The provision (§ 1131 of the School Code) in summary establishes the Secretary of Education as the ultimate fact finder in cases of this nature and with this statute goes the power to determine the credibility of witnesses, the weight of their testimony and the inferences to be drawn therefrom. *Grant v. Centennial School District* Pa. Commonwealth Court-- *403 A.2d 157,159* (June 27, 1979).

In this case, as detailed in the findings of fact, there is no substantial,credible evidence to support the Board's conclusion that Mr. Fasnacht slept in class on several occasions. When each alleged incident is examined separately, it is apparent that the administration has not met its burden of proof.

Although a number of supervisors testified that they thought they saw Mr. Fasnacht asleep at his desk at various times, their inability to determine whether the flaccid, corpulent Mr. Fasnacht had his eyes open or closed under similar circumstances at his hearing renders their testimony suspect. Much more importantly, their actions on those occasions belie their words. With only two exceptions, no supervisor ever entered Mr. Fasnacht's room where supposedly he was asleep in a class of mentally retarded children. Dr. Jenkins testified that he suspended Mr. Fasnacht with "regard for the children's safety and welfare due to lack of supervision." N.T. 9. Yet, it is impossible to believe that a teacher's superior--whether assistant principal, principal or superintendent--would have so little regard for mentally retarded school children's safety and welfare that he would perceive their teacher to be asleep and simply return to his office without intervening in anyway to protect those children.

Only Dr. Jenkins ever entered Mr. Fasnacht's classroom when he thought he saw him asleep. On neither occasion did he have to awaken Mr. Fasnacht physically, but rather Mr Fasnacht noticed him as he approached near to his desk. Mr. Fasnacht adequately explained his failure to note Dr. Jenkins until then by his loss of hearing at the time, which was subsequently ameliorated. Significantly, Dr. Jenkins could not tell whether Mr. Fasnacht's eyes were open or closed when their relative positions on these occasions were re-created at the hearing. Had Dr. Jenkins had to awaken Mr. Fasnacht on these occasions, were he able to determine in a re-created situation whether Mr. Fasnacht's eyes were open or shut, if there were corroborating testimony from students that Mr. Fasnacht was asleep, if Mr. Fasnacht had been heard snoring, or if Mr. Fasnacht's class was out of control, then the charges of sleeping might be established. On the record that comes to the Secretary, these charges are simply unsubstantiated.

C. Back Pay Where a Suspension is Upheld

Since we find that the Board has not established that Mr. Fasnacht was guilty of persistent negligence, it is unnecessary to decide this issue.

Accordingly, we make the following:

ORDER

AND NOW, this 4th day of September , 1980, it is hereby Ordered and Decreed that the decision of the Board of School Directors of the Eastern York School District terminating Myron L. Fasnacht for persistent negligence be reversed, and that Myron L. Fasnacht be reinstated with back pay.

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

Judith Gurmankin, :
Appellant :
:
v. : Teacher Tenure Appeal
: No. 19-79
SCHOOL DISTIRCT OF PHILADELPHIA, :
Appellee :

OPINION

Judith Gurmankin, Appellant herein, has appealed her October 9, 1979 dismissal by the School District of Philadelphia. For reasons stated below, the Secretary of Education has dismissed the appeal.

FINDINGS OF FACT

1. Judith Gurmankin, Appellant herein, was a professional employee of the School District of Philadelphia employed as a high school teacher at the time of the actions herein appealed. (Appellant's Petition, paragraph 1)

2. By letter dated October 9, 1979 the Board of Education of the School District of Philadelphia advised Appellant that she had been dismissed. (Appellant's Petition, paragraphs 2, 12)

3. On November 8, 1979 Appellant appealed the action of the School District of Philadelphia to the Secretary of Education pursuant to Section 1131 of the Public School Code, 24 P.S. §11-1131.

4. By letter dated January 23, 1980 Michael A. Valanza, Attorney for Appellant, notified the hearing officer, Linda J. Wells, Esquire, that Appellant had advised him of her desire to withdraw her Petition of Appeal.

5. In the same letter referenced above, attorney for Appellant notified Ms. Wells that Appellant had advised him that she would be seeking new counsel to represent her in any future hearings.

6. In view of Appellant's stated decision to seek new counsel it was agreed between Linda J. Wells, hearing officer, and Michael A. Valanza that action before the Secretary of Education would be postponed until Appellant had had an opportunity to engage other counsel and her new counsel had had an opportunity to advise Appellant further on her decision to withdraw her Petition of Appeal with the Secretary of Education.

7. By letter dated February 2, 1980, addressed "To Whom it May Concern," Appellant herself informed the Secretary of Education as follows: "I want to put off the meeting. My case is Federal.... I want to put off the hearing with the Secretary of Education, until I hear from the Federal government."

8. Linda J. Wells, hearing officer, unsuccessfully attempted to contact Appellant following her letter of February 2, 1980 to determine her intent to pursue her appeal.

9. In two years since the date of Appellant's letter to the Secretary of Education, no contact has been made by Appellant or any attorney acting in her behalf to pursue the appeal filed with the Secretary of Education.

DISCUSSION

Appellant was notified in October, 1979 that the Board of School Directors of the School District of Philadelphia had dismissed her as a teacher. In November, 1979 she filed a Petition of Appeal before the

Secretary of Education. Following the filing of her appeal the only contact received from Appellant is correspondence from her attorney indicating Appellant's desire to withdraw her appeal followed by Appellant's own correspondence indicating her desire to put off her hearing before the Secretary of Education. Since the receipt of that correspondence there has been no effort to contact the Secretary of Education to either clarify Appellant's desire to withdraw her appeal or to pursue the appeal. Failure to pursue this appeal for such an extended period of time is grounds for dismissal.

Accordingly, we enter the following:

ORDER

AND NOW, this 11th day of February, 198[illegible], it is Ordered and Decreed that the appeal of Judith Gurmankin be dismissed.

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

JOHN A. MIGNONE, Appellant	:	
v.	:	TEACHER TENURE APPEAL No. 20-79
RADNOR TOWNSHIP SCHOOL DISTRICT, Appellee	:	

OPINION

John A. Mignone, Appellant herein, has appealed from a decision of the Radnor Township School District dismissing him as a professional employee on grounds of persistent negligence, incompetency, and willful violation of school laws.

FINDINGS OF FACT

1. John A. Mignone (Appellant) was hired as a professional employee of the Radnor Township School District (Radnor) in September of 1962 where he was continually employed until his suspension with pay, May 14, 1979. (N.T. 15-49).
2. Appellant's assignment as a professional employee of the Radnor School District from 1962 to 1967 was that of a science teacher at the middle school. (N.T. 16-45).
3. In 1967 Appellant was appointed to the position of Coordinator of Educational Technology. (N.T. 16-45). During this time Appellant did not teach classes; he was transferred to the senior high school. His duties entailed planning a television project in conjunction with the general expansion of the high school program. This plan was to involve all of the schools in the school district. Appellant

was to design the studio, the program, its utilization, and the courses that would be added to the curriculum in accompaniment of this expansion. (N.T. 15-57, 16-45, Exhibit M-22).

4. In 1969 Appellant became the district's audiovisual coordinator and teacher of aviation until 1975-1976, when he became audiovisual and television coordinator for the high school. In 1976-1977 Appellant was audiovisual television coordinator for the high school and teacher of aviation and physical science. (N.T. 16-47).

5. In 1977 Appellant's assignment was changed from audiovisual television coordinator to full-time science teacher. This change occurred in order to improve the efficiency of the audiovisual television program, and to obtain more economic use of teacher resources. This change enabled a full-time audiovisual coordinator to be hired in hopes of making the program more effective. (N.T. 1-49, 111, 112, 114).

6. Appellant returned to the classroom on a full-time teaching basis. He taught three sections of ninth grade physical science, and one section of astronomy. In 1978-1979 Appellant had the same schedule plus one section of geology each semester. (N.T. 3-6).

7. Dr. John C. Crosby is the District Superintendent of Radnor Township School District. He holds a Superintendent's Letter of Eligibility and has been so employed since January of 1976. (N.T. 1-11, 14).

8. Dr. William F. Duffey is Assistant Director Superintendent of Personnel of Radnor Township School District. He is responsible for supervision and evaluation of personnel. He has been employed

by Radnor School District since 1976. (N.T. 2-51, 53). He is also responsible for teacher evaluation programs in Radnor. (N.T. 1-18, 19).

9. Mr. Donald P. Anderson is the Principal of Radnor High School. He has been so employed since 1973. (N.T. 3-5).

10. Mrs. Sarah Knupp is the Assistant Principal for Instruction at Radnor High School. She has taught chemistry at Radnor High School for twelve years, was department chairperson for a year, and has been the Assistant Principal of Instruction for the last three years. (N.T. 9-67).

11. John J. Chidester is Assistant Principal for Administration at Radnor High School. He has been employed in this position since 1969. (N.T. 5-69).

12. In 1976, an effort was made by the Superintendent to adopt a systematic approach to the matter of teacher evaluation. A classroom observation policy (See Exhibit S-1) was adopted in order to improve the uniformity and the consistency of teacher evaluation. (N.T. 1-15, 17).

13. A classroom observation of each teacher in Radnor Township is performed at least once per year. (N.T. 1-19). The observation form includes the major categories of lesson, teacher, environment, management, and also provides a space for observer comments. The form also reserves a space where the teacher can request a conference. A copy of a completed observation form is sent to the teacher who was observed. (N.T. 1-21, 56, 57, 2-57, Exhibit S-1).

14. The Radnor classroom observation form is used for classroom observation and is also a component of the rating process. Radnor includes administrative records and administrative notes of teacher performance in areas other than classroom performance of teaching as components of teacher ratings. (N.T. 1-21).

15. Consistent with Pennsylvania law, teachers in the Radnor School District are rated at least once a year. (N.T. 1-25).

16. Using this information, the principal prepares the teacher evaluation/rating on the DEBE-333 form. If the rating is unsatisfactory, the principal and superintendent meet to discuss the rating. The superintendent then reads the information available to him in the anecdotal record and reads the classroom observation report in order to determine whether or not he concurs in the unsatisfactory rating. If the superintendent concurs with the principal's rating, he signs the DEBE-333 form. The teacher may appeal this rating to the superintendent. (N.T. 1-22, 23).

17. During the ten years preceeding the 1977-78 school year, virtually all DEBE-333 rating forms at Radnor High School contained identical numerical scores of 80, the maximum score a teacher could receive. Mr. Anderson, the principal, ordinarily gave teachers an 80 if their overall rating was satisfactory.

18. In the summer of 1978, the Superintendent requested that the principal, Mr. Anderson, make a more intensive observation of ten teachers whom he felt, based on comment and criticisms he had received, should be more closely observed to see if they were

performing satisfactorily or not, and if not to offer them assistance. (N.T. 1-27, 28, 31, 32, 33, 35, 36, 94, 95).

19. Appellant was on the list of teachers that the Superintendent asked the Principal to observe more closely. Where repeated criticism was lodged against a teacher, the Principal was to determine the validity of said criticism and offer appropriate assistance. However, if the criticism was unsubstantiated through the observations then the teacher could be freed from any unjust accusations so that he or she could truly teach. (N.T. 1-35, 36).

20. The teachers named on the list were advised that they would be observed more frequently; the Superintendent met with a group of these named individuals who requested a meeting, and the Superintendent distributed newsletters to the staff which explained the purposes of the more rigorous evaluation policy. (N.T. 1-29, 30, 31, 32; Exhibit S-4a, 4b). The Superintendent maintains that these teachers were subjected to more evaluations, not more rigorous standards than the other teachers in the district. (N.T. 3-38).

21. Appellant met with Mr. Anderson, on September 13, 1978. At this time Mr. Anderson advised Appellant that he would be observed more frequently based upon the new policy. (N.T. 3-44, 45).

22. Appellant was rated "satisfactory" for each year at Radnor School District from 1962 through 1977-78 school year. (Exhibits M-2 through M-13).

23. Appellant was rated "unsatisfactory" for the first semester of 1978-79 school year by Mr. Anderson on January 10, 1979, after

Mr. Anderson had consulted with Assistant Principals Chidester and Knupp. The numerical score assigned was 58.5. Appellant was given a copy of the rating and anecdotal record on January 12, 1979. This rating was discussed with him at a short meeting on January 15, 1979. (N.T. 3-84, 87, 4-32, 15-97, 98; Exhibit S-20).

24. The only classroom observation of Appellant made during the fall term of 1978-79 was performed on October 16, 1978 by Assistant Principal Knupp. Out of 28 items on the form, two of these, discipline and classroom organization, were marked with an "I" for needs improvement.

25. There is a dispute as to the meaning of the use of the letter "I" on the classroom observation form, S-1. The definition on the legend of the form states that an "I" is used to denote "improvement needed." Dr. Duffey, Mr. Anderson, Mr. Chidester, and Mrs. Knupp, stated that they used the designation "I" on the form to mean that the items so marked are "unsatisfactory" at the time of the observation. Dr. Crosby, says that an "I" does not mean unsatisfactory in and of itself. (N.T. 2-71, 4-26, 5-87, 9-73, 117, 1-106, 110).

26. On the classroom observation form for October 16, 1978 Assistant Principal Knupp commented that some of the students of Appellant's physical science class were pushing and shoving each other in the hall when Appellant arrived at class at 1:07 p.m. A fire drill took place and Mrs. Knupp noted that the class was very noisy and slow to settle down to business. She also commented that although the students were very noisy, they seemed to be interested in the experiments in which they were engaged. (Exhibit S-10).

27. In order to arrive at an unsatisfactory rating for Appellant for the fall term of 1978-1979, the Superintendent stated that the single classroom observation for this term was not sufficient in and of itself and therefore the observation had to be utilized in conjunction with the anecdotal records to arrive at the unsatisfactory determination. (N.T. 2-15, 16).

28. The anecdotal records included some incidents predating the rating period because Mr. Anderson believed they evidenced unacceptable conduct which had predated the rating period and had continued through it.

29. The Superintendent reviewed the DEBE-333 unsatisfactory rating of Appellant for the first semester and the anecdotal record attached, and approved and signed it on January 23, 1979. (Exhibit S-20).

30. Appellant, feeling that the rating was unfair, requested the Superintendent investigate the unsatisfactory ratings. The Superintendent went to the high school and met with six students and three teachers to determine the fairness of Mr. Mignone's unsatisfactory rating. The Superintendent felt that the rating was fair, just, and correct. (N.T. 1-64, 70; Exhibit S-21).

31. Appellant was rated "unsatisfactory" by Mr. Anderson for the second semester of the 1978-1979 school year after Mr. Anderson consulted with Assistant Principals Chidester and Knupp. Appellant received a copy of this rating on May 13, 1979. (N.T. 4-38; Exhibit S-24).

32. Appellant was rated "unsatisfactory" because seven classroom observations indicated that his classes were not well ordered, the attitudes

of his students towards his teaching was poor, students continued to complain about his teaching methods and conduct, he continued to violate basic operating policies and he failed to improve his performance to a satisfactory level from his previous unsatisfactory rating issued for the fall term of 1978-1979. (N.T. 4-39, 40).

33. The Superintendent approved the unsatisfactory DEBE-333 rating for the second semester after reviewing it with Dr. Duffey, Mr. Anderson, Mr. Chidester, and Mrs. Knupp. (N.T. 1-63, 4-38).

34. It was the professional opinion of the Superintendent that Appellant's professional performance during the 1978-1979 school year was unsatisfactory. This professional opinion was based upon the Superintendent's review of all the records relating to Appellant. The Superintendent stated that Appellant neglected to perform his duties as required by the Public School Code during the 1978-1979 school year. (1-80, 81).

35. The Assistant Superintendent concurred in the professional opinion of the Superintendent. After a review of all of the records relating to Appellant's 1978-1979 school year, Dr. Duffey felt Appellant was not competent and that he refused or neglected to obey the directives of his Principal during that period. (N.T. 2-76).

36. Based on information available to them as Assistant Principals, both Mr. Chidester and Mrs. Knupp have the professional opinion that Appellant's performance during the 1978-1979 school year was unsatisfactory. (N.T. 6-49, 56, 9-97).

37. The evaluation of a teacher on the DEBE-333 is in most respects a subjective determination with a numerical score so designated. (N.T. 4-65, 4-68).

38. Eight classroom observations were performed on Appellant during the second half of the 1978-1979 school year. (Exhibit S-11, S-12, S-13, S-14, S-15, S-16, S-17, and S-18).

39. Assistant Principal Knupp observed Appellant's ninth grade physical science class three consecutive days in February of 1979. On February 26, 1979 Mrs. Knupp found that improvement was needed in the following ten categories: achieves rapport, arouses interest, effective development, appropriateness, effectiveness, participation, group response, personal enthusiasm, routine procedures and discipline. Mrs. Knupp commented that although Appellant's explanation was clear and well done the teacher did not have the attention of many of the students. Mrs. Knupp testified at the school board hearing that this class was completely out of control. (N.T. 9-74; Exhibit S-11).

40. On February 27, 1979 Mrs. Knupp found Appellant's performance to be in need of improvement in the following categories: achieves rapport, arouses interest, effective development, variety, effectiveness, group response, personal enthusiasm, routine procedures and discipline. Mrs. Knupp commented on this observation form that several students were tardy and failed to sign in on the green sheet as Radnor High School policy for lateness of students required.

Mrs. Knupp further commented that during the class several paper wads were thrown towards the front of the classroom and that Appellant ignored these. Mrs. Knupp concluded that this class was much better than the class on February 26, 1979. (Exhibit S-12).

41. In the classroom observation of Appellant on February 28, 1979 Assistant Principal Knupp listed Appellant in need of improvement in only one category, that of classroom organization. Mrs. Knupp stated that participation under the category of student involvement was outstanding. Mrs. Knupp further commented that it was a good class period with appropriate use of time.

42. Dr. Duffey observed Appellant's physical science class on March 19, 1979. Dr. Duffey assigned Appellant an "I" in the following categories: achieves rapport, arouses interest, effectiveness, participation, group response, conclusions drawn, lessons summarized, personal enthusiasm, positive reinforcement, and discipline. Dr. Duffey commented that this was one of the most distressing examples of teaching he had ever seen.

43. Dr. Duffey observed Appellant's class on March 22, 1979. Dr. Duffey assigned Appellant an "I" in the following categories: achieves rapport, arouses interest, effective development, variety, appropriateness, effectiveness, participation, group response, lessons summarized, personal enthusiasm, positive reinforcement and discipline. Dr. Duffey found that Appellant was not in control of his class.

44. Dr. Duffey discussed his classroom observation on March 19 and 22, 1979 with Appellant. (N.T. 2-71).

45. Assistant Principal Chidester observed Appellant's geology class on March 26, 1979. Mr. Chidester assigned Appellant an "I" in the following categories: states purpose, arouses interest, illuminates subject, clear sequence, effective development, appropriateness, effectiveness, participation, group response, conclusions drawn, lessons summarized, positive reinforcement, and classroom organization. Mr. Chidester commented on student lateness and the absence of a sign-in form which caused Appellant to send a student to the office to get one. Mr. Chidester further noted that no students participated vocally during the entire class. Mr. Chidester listed five suggestions for Appellant to improve his teaching performance on this classroom observation form. (N.T. 5-88, 89, 90; Exhibit S-16).

46. Mr. Chidester observed Appellant's astronomy class on March 27, 1979. He assigned an "I" to Appellant in the following categories: states purpose, arouses interest, illuminates subject, effectiveness, participation, group response, conclusions drawn, and lessons summarized. Mr. Chidester noted student lateness. He further commented that the lesson was strictly teacher-dominated. Mr. Chidester issued five suggestions to Appellant to improve his performance. (N.T. 5-90, 91; Exhibit S-17).

47. Mr. Chidester described the two March 1979 classes as very inadequate and very unsatisfactory at the hearing before the School Board. (N.T. 5-92; 6-49).

48. Principal Anderson observed Appellant's ninth grade physical science class on March 30, 1979. Mr. Anderson assigned Appellant an "I" in the following categories: achieves rapport, effective development, effectiveness, group response, attitude, housekeeping, routine procedures, discipline, and classroom organization. Mr. Anderson commented that Appellant arrived a full minute late. Mr. Anderson further noted that the lab group worked well for a few minutes; then socialization generally replaced the search for scientific knowledge. Mr. Anderson further stated that this was the last class on Friday, for both students and teacher. Mr. Anderson made suggestions to Appellant on the classroom observation forms for how he might improve his teacher performance. In these suggestions, Mr. Anderson emphasized that the teacher sets the tone, always. (N.T. 4-28, 29; Exhibit S-18).

49. During the 1978-79 school year, administrators at the Radnor School District made numerous suggestions to Appellant concerning ways by which he could improve his teaching performance. (N.T. 1-104, 2-72, 3-81, 4-62, 5-41, 44, 90; Exhibit S-8, S-9, S-11, S-12, S-13, S-16, S-17, S-18). On the basis of classroom observations, both Mr. Anderson and Dr. Crosby had the professional opinion that Appellant was in need of improvement and did not so improve during the 1978-79 school year. The absence of improvement was particularly noted in areas of student involvement, achieving rapport with the students, arousing interest, routine procedures and discipline and classroom organization. (N.T. 1-58, 59, 197; 4-28, 29, 31).

50. After Appellant was suspended with pay, 46 of his former ninth grade physical science students signed a petition at the conclusion of the 1978-79 school year requesting pass/fail grading alleging that they were not taught the same material as other ninth grade students and therefore did not wish to take the departmental science exam. (N.T. 7-79, 108; 9-9, 93; Exhibit S-34).

51. Mr. Anderson keeps an administrative performance log on each teacher assigned to him, and has done so for some 13 years. This is a method he utilizes to give himself a basis for recognizing patterns of failure of teachers to meet administrative obligations so that he can effectively deal with these problems. The faculty are aware of Mr. Anderson's log and are cognizant of the fact that he uses it as a part of his rating process of their professional performance. (N.T. 3-41, 44).

52. The entries in this log on Appellant constituted a substantial part of the anecdotal record that Mr. Anderson prepared to accompany the unsatisfactory rating. (Exhibits S-20, S-24).

53. Appellant was persistently late. He was repeatedly late to school, classes and administrative meetings. (Exhibits S-20, S-24; N.T. 3-59, 65, 66).

54. Appellant persistently failed to leave adequate record plans for substitute teachers as required by school policy. (N.T. 3-78, 79, 6-95 to 105, 7-77, 8-108, 109).

55. Appellant persistently failed to abide by appropriate administrative procedures and school policy regarding field trips. (Exhibit S-24; N.T. 3-53 to 57, 4-95, 96, 9-81 to 92, 16-69).

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56. Appellant persistently failed to maintain order and an appropriate atmosphere during his homeroom period. The principal was required to intervene and restore order on several occassions. (N.T. 3-59, 60).

57. On May 11, the DEBE-333, with an unsatisfactory rating, was prepared and submitted to Appellant by Mr. Anderson. Because of the length of this document, Mr. Anderson told Appellant he could take it home, look at it, study it, review it and that a meeting would be scheduled the following Monday morning to discuss the DEBE-333 report. (N.T. 1-74-75).

58. On May 14, 1979 at the meeting to discuss the DEBE-333 unsatisfactory rating of Appellant, Mr. Anderson indicated that because of the unsatisfactory rating, charges had been prepared and that he would recommend to the Superintendent and ultimately to the School Board that hearings be started to dismiss Appellant as an unsatisfactory teacher. (N.T. 1-75).

59. At the meeting on May 14, 1979 the Superintendent informed Appellant that based on the two unsatisfactory ratings and his professional opinion as to Appellant's incompetency as a classroom teacher, he was suspending Appellant with pay for the remainder of the school year and that a hearing would take place to determine whether or not he would continue as a teacher in the Radnor School District. (N.T. 1-76).

60. A special meeting of the Radnor Township Board of School Directors was held on May 16, 1979. The Board accepted the recommendation of the Superintendent and voted to hear the charges that were set forth. The Board approved the suspension with pay of Appellant effective May 14 pending their decision on the dismissal charges. The Board's decision was unanimous. (N.T. 1-77, 78).

61. On May 17, 1979 Appellant was sent by certified mail a four page letter listing the charges against him.

62. Seventeen dismissal hearings were held on the following dates: June 18, 19, 27, July 9, 10, 12, 16, 23, 30, 31, August 8, 13, 15 23, 28, September 12, and October 10, 1979. (N.T. Volumes 1-17).

63. On October 23, 1979 at a special meeting the Board of School Directors of Radnor Township voted to dismiss Appellant, John A. Mignone, on the grounds of incompetence, persistent negligence and willful violation of school laws.

64. On October 24, 1979 the Board of School Directors notified Appellant that he had been dismissed for incompetency, persistent negligence and willful violation of school laws, effective October 23, 1979.

65. On November 13, 1979 the Secretary of Education received a Petition for Appeal on behalf of the Appellant.

66. On January 22, 1980 a hearing was held before a hearing examiner appointed by the Secretary of Education.

DISCUSSION

Having reviewed the decision of the Board and the lengthy record of the hearing before the Board, and having heard argument on behalf of the Appellant and the Radnor School District, it is our conclusion that the charges against the Appellant are supported by substantial evidence. We uphold the decision of the Board dismissing Appellant, John A. Mignone, for incompetency, persistent negligence and willful violation of school laws.

The record of the hearing before the Radnor School Board consisted of approximately two thousand pages of testimony and exhibits. The Secretary of Education, functioning as an administrative determinator of fact, is not required to set forth findings specifically noting the rejection, and reasons for such rejection, of each and every minor allegation raised at the dismissal hearings of Appellant. Application of Midwestern Fidelity Corp. 26 Pa.Commw.Ct. 211, 363 A.2d 892 (1976). Rather, the Secretary's duty in promulgating an order is to set forth the findings of fact which are essential to the validity of such order. The findings must be sufficiently specific to enable the court in reviewing that action to pass upon questions of law. Grant v. Board of School Directors, Centennial School District, 43 Pa. Commw.Ct 556, 403 A.2d 157 (1979), Gottshall v. Blatt, 71 Dauph. 383 (1959). Sections 507, 704 of the Administration Agency Law, 2 Pa.C.S. §§507, 704. Such administrative findings must be based upon the evidence and should state the factual situation clearly and unequivocally. Appeal of Veterans Club of Shopa-Davey Home Assoc. of Blakely, 50 Lack. Jr. 29 (1949).

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On May 17, 1979 a twenty-four count proposed statement of charges alleging incompetency, persistent negligence, and willful violation of school laws was submitted to the Radnor Township Board of School Directors which accepted them by resolution as valid charges warranting a dismissal hearing for John A. Mignone. Seventeen separate hearings were conducted in which numerous witnesses testified for the school district and for Appellant. At the conclusion of the hearings the Board of School Directors of Radnor Township found support for all twenty four charges against Appellant and voted to dismiss him.

Appellant raises as his first issue an evidentiary question. He contends that all of the evidence was of actions taken by the various administrators which violated the spirit and purpose of the Teacher Tenure Act and therefore cannot provide a valid basis for dismissal. Appellant asserts that Principal Donald Anderson was unfair and malicious in his effort to evaluate Appellant more rigorously than other teachers. Appellant further states that no attempt was made by the principal to ascertain whether the accusations he, as principal, received and recorded were valid. Appellant declares that he was the target of the venom and malice of the principal.

We find that Appellant's allegations that the principal was "biased" and "out to get him" are without merit. Not only does Appellant fail to point to any evidence in the record showing malice on the part of the principal, or indicate any reason for such motive, he ignores the fact that four other certified administrators also testified as to his incompetence. Here Appellant's argument is similar to that made by the Respondent in Steffen v. Board of School Directors of South Middletown Township School District, 32 Pa.Commw.Ct. 187, 377 A.2d 1381 (1977). In that case, Mr. Steffen contended that there was a conspiracy on the part of the school administration that led to his discharge, not any actual incompetency on his part. The Commonwealth Court held that it was Mr. Steffen's "inability to perform his functions as an instructor or educator to the students, his inability to maintain order in his classroom and his unwillingness to improve his performance...that led to his discharge, not a conspiracy." Id. at 1385.

Even if, arguendo, the principal did harbor some personal malice against Appellant, it is inconceivable to us that a principal could persuade four certified administrators, students, parents, fellow teachers and Appellant's Department Chairman, totaling twenty-six witnesses, to perjure themselves by testifying that Appellant was incompetent if indeed he was not incompetent. We hold it was Appellant's inability to maintain an appropriate educational atmosphere in his classroom, his lack of rapport with his students, his violation of school rules and his inability or refusal to improve his unsatisfactory performance of the fall term 1978-1979 school year, as evidenced by his unsatisfactory rating for the spring term of 1978-1979, that led to his dismissal, not any personal vendetta alleged to have been waged against him by the principal.

Appellant next contends that the evidence itself, introduced through the evaluations, anecdotal record and testimony does not provide a substantial basis for dismissal because it was incomplete, inaccurate, and not given in proper form. The Secretary finds this claim to be void of merit. Section 11-1122 of the School Code, 24 P.S. §11-1122, provides that:

> The only valid causes for termination of a contract...(with a) professional employee shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement...(and) persistent and willful violation of the school laws."

Section 11-1123, 24 P.S. §11-1123, of the School Code further provides that:

> In determining whether a professional employee shall be dismissed for incompetency, (said employee) shall be rated by an approved rating system which shall give due consideration to personality, preparation, technique and pupil reaction...provided that no unsatisfactory rating shall be valid unless approved by the district superintendent."

In the instant case, Appellant received an unsatisfactory rating for the fall and spring terms of 1978-1979 school year. [Exhibits S-20, S-24]. Both of the unsatisfactory ratings were made on the DEBE-333 forms, an approved rating form. The District Superintendent, Dr. Crosby approved both of the unsatisfactory ratings. We find that the ratings, the testimony, and evidence introduced during the hearings, provided substantial evidence for Appellant's termination on reasons of incompetency.

In Thall Appeal, 410 Pa. 222, 189 A.2d 249 (1963) the court held that two preliminary unsatisfactory ratings must be made before a professional employee may be dismissed for incompetency, stating that the first rating is to serve as notice that improvement is needed. The second unsatisfactory rating indicates failure to improve. The Secretary of Education finds that Appellant received two valid unsatisfactory ratings justifying dismissal on the basis of incompetency.

Appellant argues that it is against the weight of evidence in this case to hold that his sixteen years of exemplary service abruptly fell to such a low level of performance as to be rated unsatisfactory for the 1978-1979 school year. While the Secretary of Education concedes that it is disheartening that a professional employee's competency deteriorated so rapidly, we note that Appellant had not been functioning in the capacity of a full-time teacher for the last twelve of the sixteen prior years for which he received satisfactory ratings. The Secretary also notes that the standards for teacher competency are not different for experienced teachers. Professional employees are credited with an appropriate number of points on the basis of seniority in the rating process, but prior satisfactory experience does not subject a teacher to a different set of professional standards.

The Steffen case, supra, is similar to the instant case. The teacher in that dismissal hearing appeal had eleven years of satisfactory performance. His position, like Appellant's was changed just prior to his unsatisfactory ratings. In affirming Steffen's dismissal for incompetency, the Secretary of Education held that "although he may once have been competent to teach social studies, it is clear that during the 1974-75 school year his performance in that subject was unsatisfactory, his students were bored and restless, and he could not maintain order."

Steffen v. Bd. of School Directors of South Middletown Township School District, Opinion of Sec. No. 259, July 6, 1976, *aff'd* 32 Pa.Commw.Ct. 187, 377 A.2d 1381 (1977). We find that the record of the dismissal hearings of Appellant, John A. Mignone, contain sufficient credible evidence to support the conclusion that Appellant was no longer functioning competently as a professional employee. [FF No. 23, 31, 32, 34 to 36, 39-57]

The court has held that failure to maintain adequate classroom control is serious enough in itself to warrant a rating of unsatisfactory. *English v. North East Board of Education*, 22 Pa.Commw.Ct. 240, 348 A.2d 494 (1975). Appellant was specifically charged with failing and neglecting to maintain discipline and control in his classrooms with respect to groups of students under his supervision (School District Charge No. 9). [F.F. No. 39, 40, 42, 43, 49, 56]

In testifying at the hearing, Dr. Duffey, Assistant Superintendent of Radnor School District, stated that his March 19, 1979 observation of Appellant's physical science class presented "one of the most distressing examples of teaching" he had ever seen. He further commented that it was his opinion that the class was "completely out of control." Inadequate preparation, lack of discipline, requests by students to transfer from a class, and student expressions of dissatisfaction with a teacher's performance have also been held to warrant an incompetency charge. *Steffen*, supra. [F.F. No. 49] The record indicates that evidence was introduced to demonstrate Appellant's deficiencies in most of the aforementioned areas. Several students were switched, as per their own or their parents' request, to another section of Appellant's class or to another teacher's section. Numerous students testified at the hearing as to the ineffectiveness of the Appellant's teaching performance.

The term incompetence is not limited to mean a mere lack of scholastic ability to instruct a given subject. *Horosko v. School District of Mount Pleasant Township*, 335 Pa. 369, 6 A.2d 866 (1939). Incompetency has been justified as grounds for dismissal where pupils and parents have complained about students who were unsuccessful in passing the teacher's exams. *Gurlich Township School District v. Korman*, 31 D&C 197 (1938). Forty-six of Appellant's ninth grade physical science students signed a petition requesting a pass or fail grade in lieu of taking the departmental final examination, alleging that they did not cover the same material as the students in the other teachers' sections. [Exhibit 34, F.F. No. 50]

Appellant's counsel also contends that irrelevant materials and hearsay testimony were admitted into the record despite objections. It is further argued that this information colored the minds of the Radnor School Board so that they could not make an impartial judgment. A careful review of the record reveals this contention to be without merit. The Board had ample factual evidence consisting of the direct testimony of many witnesses involving numerous incidents on which to base its decision to dismiss Appellant. It has been held that the admission of hearsay in support of other evidence in an administrative hearing is permissible. *Bd. of Public Education of School District of Pittsburgh v. Pyle*, 37 Pa.Commw.Ct. 386, 390 A.2d 904 (1978). Findings based solely on hearsay evidence cannot stand. Unemployment Bd. of Review v. Cooper, 25 Pa.Commw.Ct. 256, 360 A.2d 293 (1976). The Secretary of Education finds that the admission of hearsay in the dismissal hearing of Appellant was permissible and even if, arguendo it was admitted in error, the error would be deemed harmless in that the Board of School Director's decision to dismiss Appellant was supported by substantial evidence independent of that hearsay, Miller v. State Dental Council and Examining Bd., 39 Pa.Commw.Ct. 613, 396 A.2d 83 (1979).

While the Appellant only raises issues concerning the validity of his dismissal for incompetency, the Radnor School District also dismissed him for persistent negligence and willful violation of school laws. [F.F. No. 64] Dismissal on either of these grounds requires neither an unsatisfactory rating nor an anecdotal record.

Failure or neglect to teach constitutes grounds for dismissal on a charge of persistent negligence. West Mahanoy Township School District v. Kelly, 156 Pa. Super. Ct. 601, 41 A.2d 244 (1945). Neglect to teach is not confined to neglect to instruct or failure to provide an adequate instructional program. Failure to perform the additional duties of a teacher which are necessary for instruction to be effective is a basis for a persistent negligence violation. Stohler v. Berks County I.U. Board, Opinion of Sec. No. 260, Dec. 22, 1975. In Stohler, like the instant case, the administration notified the teacher that his work was not satisfactory and gave him suggestions and directives to make his teaching more effective. Appellant, similarly notified and advised, consistently failed to follow these directives. Id. [F.F. No. 49]

In Stroman v. Board of School Director of Harrisburg County School District, Opinion of Sec. No. 207, June 1, 1972, aff'd., 7 Pa.Commw.Ct. 418, 300 A.2d 286 (1973) the court held that failure to maintain rapport with students, chronic lateness, and inability to cope with students were sufficient to sustain a persistent negligence charge. Appellant was observed as needing improvement in "achieves rapport" with students five separate times in the 1978-1979 school year. [F.F. No. 39, 40, 42, 43, 48] The record also indicates that Appellant was not only late for school on various occasions, but he was chronically late for specific classes. [F.F. 53]

The Secretary of Education finds that Appellant's dismissal on the grounds of persistent and willful violation of school rules was also justified. Refusal or neglect to obey reasonable school regulations has been held to constitute persistent and willful violation of school laws warranting dismissal. Board of School Directors of Ambridge Borough School District, Beaver County v. Snyder, 346 Pa. 103, 29 A.2d 34 (1943). Failure to maintain lesson plans, and failure to submit attendance sheets, was also held to justify dismissal in Barndt v. Board of School Directors v. Wissahickon, Opinion of Sec. No. 255, January 27, 1976, aff'd. 28 Pa.Commw.Ct. 482, 368 A.2d 1355 (1977). Repeated refusals to comply with school policies and procedures, and neglect to follow directions of superiors warranted removal in Tucci v. Olay Valley School Bd., Opinion of Sec. No. 281, Aug. 17, 1970. Leaving school premises without notifying the office of departure and destination, making personal phone calls contrary to school rules, parking contrary to the faculty manual and attempting to obtain disciplinary records of students without authority or permission were held to be persistent and willful violations of school laws in Giangiacomo v. Pottsgrove School Board, Opinion of Sec. No. 304, Jan. 17, 1977.

We find that Appellant's chronic tardiness, neglect to require late students to sign in, failure to report students cutting class, failure to file appropriate substitute lesson plans, failure to follow procedures for field trips, failure to maintain order in his homeroom during announcements, failure to follow rules regarding dismissal of classes, and failure to adequately perform classroom duties constitute persistent and willful violation of school laws. [F.F. 45, 53, 54, 55, 56]

Thus it is our opinion that the Radnor School Board's decision to dismiss the Appellant on the grounds of incompetency, persistent negligence and persistent and willful violation of school laws is supported by substantial evidence in the record.

Accordingly, we make the following:

ORDER

AND NOW, this 26th day of February, 1981, it is ordered and decreed that the Appeal of John A. Mignone from the decision of the Radnor Township School District is hereby dismissed.

Robert G. Scanlon
Secretary of Education
Commonwealth of Pennsylvania

COMMONWEALTH OF PENNSYLVANIA

Department of Education

Florence Ryan, :
:
Appellant :
:
v. : Teacher Tenure Appeal No. 22-79
:
Board of School Directors :
of Lackawanna Trails :
District, :
:
Appellee :

OPINION

Florence Ryan, Appellant herein, has appealed from the decision of the Board of Directors of the Lackawanna Trails School District terminating her contract and dismissing her as a professional employee on the grounds of persistent negligence.

FINDINGS OF FACT

1. The Appellant is a professional employee. She has been an employee of the Lackawanna Trails School District, "the District", since July 1, 1966.

2. During the 1978-79 school year, Appellant was employed as a sixth grade teacher at the District's Benton Elementary School.

3. By notice dated June 21, 1978, Appellant was presented with a detailed statement of charges seeking her dismissal as

a professional employee on the grounds of immorality, persistent negligence, and persistent and willful violations of school laws. Appellant was advised in writing of the charges against her and of the proposed public hearing on the charges to be held pursuant to Section 1127 of the School Code (24 P.S. §11-1127). (N.T. 4-9)

4. Appellant was advised of her right to a hearing pursuant to Section 1127 of the School Code and a hearing before the District Board of School Directors, "the Board", was duly held on July 23 and 24, 1979. At said hearing Ryan was represented by counsel and was given full opportunity to cross-examine all witnesses and to present testimony and evidence on her own behalf.

5. On October 29, 1979, at a duly advertised special meeting, the Board voted upon the three charges against Appellant, dismissing the charges of immorality and willful violation of the school laws, and sustaining the charge of persistent negligence (See Minutes to Board Meeting of 10/29/79).

6. No Findings of Fact were adopted by the Board in reaching its decision on the charges against Appellant.

7. On November 28, 1979, Appellant filed a Petition for Appeal from the adverse decision of the Board with the Secretary of Education.

8. On May 18, 1979, Appellant ceased teaching in the District's Benton Elementary School and did not return to her position for the remainder of the school year. (NT 130, 253, 264, 265)

9. On Monday, May 21, 1979, a handwritten statement from Appellant's physician, Thomas McDonald, M.D., was delivered to Appellant's superior, Mr. Williams, the principal of Benton Elementary School, by Mr. Conway, PSEA representative. The statement was dated "5/18/79" and read "'tension fatigue' advise one to two weeks rest from work". (NT 130-132, 253, 264-265, School District Exhibit 7)

10. In response to the District's request for further information, Appellant submitted a second statement from Dr. McDonald, also dated "5/18/79", which read "ill, under my care, and unable to work since May 17, 1979". (N.T. 264-265, School District Exhibit 3-A)

11. A third notice regarding Appellant's absence was submitted to the District on or about May 29, 1979. That notice, under the letterhead of Stanley W. Owen, M.D., read "due to exiting (sic) eye condition, Mrs. Ryan will be unable to perform her work duties until further notice". (N.T. 265, School District Exhibit 8)

12. All medical statements provided to the District by Appellant were delivered on her behalf by third parties. (N.T. 130-132)

13. There is no medical evidence in the record which suggests that Appellant was medically able to perform her duties from May 17, 1979 to the end of the school year.

14. District policy required the grading of the "habits and attitudes" section of students' report cards with explanatory letter symbols. Appellant used a dual system of marking and added check marks in addition to required explanatory symbols. The Appellant was never instructed not to include check marks on the report cards. (N.T. 133-137, 246, 265-266)

15. District policy required the generation of special reports to be used to notify parents about the grade status of children not doing well in school. Appellant knew this policy and had used the District's special certificate forms in the past years, but did not use the special forms throughout the 1978-79 school year. (N.T. 137-140, 295-296)

16. Appellant telephoned and met with parents and communicated to them by note instead of using the required form. Ryan received no warning or direction that her methods of parent notice were unacceptable to her superiors. (N.T. 266-267)

17. For the first eight months of the 1978-79 school year, Appellant divided her class into three reading levels. For the remaining weeks of the school year, all the class was grouped into a single reading level. Appellant testified that this was done because the lower level children had completed their reading material and she felt that the class was capable of being combined into one group. (N.T. 233-236, 313-320)

18. A level of more advanced reading books to which certain students in Appellant's class may have advanced did exist, but Appellant had no reason to believe that such books might be available for her class. Appellant's experience at the beginning of the school year gave her reason to believe that such books would not be readily obtainable for her classroom. (N.T. 140-141, 233-236)

19. Appellant's classroom rule required that only one student leave the classroom at any time. On occasion more than one child was seen out of the classroom, sometimes unbeknownst to Appellant. Classroom policy was later amended to require that students sign before leaving the classroom. (N.T. 51, 68, 298-300)

20. On one occasion during the 1978-79 school year, students in Appellant's class were observed by Mr. Williams, Princi-

pal of the Benton Elementary School, playing on the school playground without any supervision. Appellant testified that on said occasion, she was observing the children from the school doorway where she was waiting with other children for their bus except for a brief period of time in which she used the lavatory facilities. Mr. Williams did not take time on that occasion to rebuke Appellant for her negligent conduct. Several days later, Mr. Williams mentioned the incident to Appellant. (N.T. 197-199, 268-269).

DISCUSSION

Appellant has been dismissed from her position as a sixth grade teacher with the Lackawanna Trail School District upon the charge of persistent negligence. Additional charges of immorality and persistent and willful violation of the school laws brought against Appellant by the school administration were dismissed by the Board.

The School Board has accorded Appellant her full opportunity to be heard in this matter. A hearing before the Board was duly held upon proper notice at which Ryan was represented by counsel and at which she was able to cross-examine all witnesses and present testimony and other evidence on her behalf.

Subsequent to the hearing the Board dismissed two of the three charges against Ryan but upheld the remaining charge of persistent negligence and, consequently, her dismissal.

In reaching its decision, the Board adopted no Findings of Fact. Accordingly, the Secretary has no choice but to act as the ultimate fact finder in this matter. In the absence of factual findings by the Board, we must look to the entire record before us to consider its support for the allegations of misconduct. We believe this approach to be in accord with dicta set forth in a recent decision of the Pennsylvania Supreme Court, Strinich v. Clairton School District, No. 80-1-137 (Sup. Ct. July 2, 1981), which deals with the issue of the Secretary's scope of review in teacher tenure appeals.

Persistent negligence is a valid cause for termination of a tenured school professional employee. Section 11-1122 of the Public School Code, 24 P.S. §11-1122. The burden of proof to sustain such a charge rests upon the District. Thomas v. Dalton Borough School District, 30 D&C 213 (1937). The evidence must also support the two elements of the charge: one, an omission to act or an act in violation of duty, Appeal of Deane, 26 Northumberland Law Journal 17 (1956); and two, continuing and consistent negligence. Lucciola v. Commonwealth of Pennsylvania, 25 Pa. Cmwlth. Ct. 419, 360 A.2d 310 (1976).

The written statement of charges originally presented to Ryan detailed six bases for the allegation of persistent negligence. Counsel for the District has conceded that two of the bases are not supported by the evidence. Accordingly, our review of the evidence is limited to its support for the remaining bases.

The first of the four allegations underlying the instant charge is that Appellant failed to attend school and teach her students without good cause from May 17, 1979 through the end of the school year. There is no question that Appellant was not present during the period from May 18, 1979 through the end of the school year. The only question is whether her absence was for good cause and with medical excuse.

The record shows that Appellant was first absent from school on Friday, May 18, 1979. On Monday, May 21, 1979, a statement from Appellant's physician, Thomas J. McDonnell, M.D., was delivered to Appellant's superior, Mr. Williams, the Principal at Benton Elementary School, by Mr. Conway, the PSEA representative. The hand written statement, set forth, on a prescription blank dated 5/18/79, read: "'Tension fatigue'. Advise 1 to 2 weeks rest from work". S.D. Ex. 7. After Appellant was advised that the District was not satisfied with the excuse that had been provided, a second statement from Dr. McDonnell was also received by Appellant's superiors. That statement, also dated 5/18/79, read: "Ill, under my care, and unable to work since May 17, 1979". S.D. Ex. 3a. The District received a third notice regarding Appellant's absence on May 29, 1979. That notice forwarded to the District by Appellant's attorney was under the letterhead of Stanley W. Boland, M.D., and read: "Due to her exiting (sic) eye condition, Mrs. Ryan will be unable to perform her work duties until further notice." School District Exhibit 8.

The district acknowledges receipt of all three notices regarding Appellant's state of health, but insists they do not adequately explain the specifics of her medical condition. Further, the district complains that Appellant's treatment of this issue was cavalier in that she arranged for the medical notices to be delivered to her supervisors through third parties rather than directly. The district's arguments are not convincing.

Under the School Code provision dealing with reimbursement for sick leave, a district "may require" an absent employee:

> "to furnish a certificate from a physician or other practitioner certifying that said employee was unable to perform his or her duties during the period of absence for which compensation is required to be paid [under the School Code]". 24 P.S. 11-1154.

Although the quoted provision is not squarely applicable to the instant charge of persistent negligence, it does provide guidance as to the type of medical excuse which would normally be expected of a professional school employee. The statements of Appellant's physicians clearly supply the scope of information called for by the statutory language. The two statements of Dr. McDonnell read together indicate that, in the opinion of her medical doctor, Appellant was suffering from a condition of "tension fatigue", and that she was unable to work from May 17, 1979 for a period of two weeks. Dr. Boland's statement documents that, in the opinion of a physician, Appellant would be unable to perform her duties for a continued period of absence.

There is no question that the district was made aware in an adequate and timely fashion that Appellant's absence was the result of a documented medical condition. Appellant's repeated efforts to comply with the district's request for additional information indicates a responsible attitude toward her duty to advise the district about her absence. The record provides no evidence to support a finding that Appellant was medically able to perform her duties from May 17, 1979 to the end of the school year. There is no showing that she deliberately abused the sick leave policy of the district. The mere fact that she delivered the medical statements through a third party rather than directly adds no support to the District's allegation.

Indeed, Appellant's reliance on a third party was clearly appropriate in light of the proferred diagnosis of "tension fatigue" which implies the need for her dependence on others. On the record before us, we find that Appellant's medical statements were timely delivered and duly supplemented upon the administration's request. In the absence of any medical evidence challenging the legitimacy of those statements, there is no basis for a finding that Appellant's failure to teach constituted persistent negligence, and, we do not sustain Appellant's dismissal on that allegation.

The second allegation of misconduct by Appellant relates to her disregard of school policy with regard to notice to parents.

One aspect of this allegation concerns a school district policy requiring that the habits and attitudes section of student report cards be graded with certain letter symbols. Appellant was dismissed, in part, on the grounds that she "failed to use the required system of marking for 'part-time subjects, skills and habits' using only check marks instead of required explanatory symbols." Statement of charges, Item 2c. But the evidence, including the testimony of the school principal, Mr. Williams, does not indicate that Appellant failed to use the required explanatory symbols, but rather that she used a dual system of marking which combined check marks with the required symbols.

There is no evidence of Appellant's willful and complete deviation from established marking policy. The record provides no indication that Appellant was ever instructed not to include check marks on the report cards or that she was ever admonished by her supervisors for doing so. We find no substantial evidence that Appellant knew or had reason to believe that her use of dual notations was misleading or confusing to parents. In sum, the evidence shows only that Appellant modified her compliance with district policy by adding check marks to the required letter symbols.

District policy also required the generation of special reports to be used to notify parents about the grade status of children not doing well in school. Appellant knew of this policy and had used the District's special triplicate forms in past years. The record indicates that Appellant did not use the special forms throughout the 1978-79 school year, but instead telephoned and met with parents and communicated to them by note. The evidence does not indicate a total disregard by Appellant of her duty to notify parents regarding their children's progress; it indicates only her failure of strict adherence to District procedures relating to the prescribed manner of doing so. Again, the record indicates no warning or direction to Appellant that her methods for assuring parent notice were unacceptable variations of District policy. It only shows that Appellant, in good faith, complied with the spirit of the special report policy.

On the basis of the record before us, we see no substantial evidence to support a finding of persistent negligence based upon Appellant's charged misconduct in providing notice to parents. The evidence shows only Appellant's failure of strict adherence to the letter of school policy by her use of check marks on report cards and her non-use of special triplicate notice forms, both in the absence of any specific contrary direction from her supervisors. Her modified compliance with school policy did not persist after warning from school authorities. There is no evidence of any unwillingness on Appellant's part to follow the reasonable directives of her supervisors or to comply with their direct orders. Accordingly, we see no basis to find that these acts either challenged or defied the authority of Appellant's superiors, or that these acts in themselves were serious enough violations of school policy to justify dismissal on the ground of persistent negligence. Compare Clairton School District v. Strinich, supra.

The third allegation against Appellant relates to her grouping of her class for reading instruction. For the first eight months of the 1978-79 school year, Appellant divided her class into three reading levels; for the remaining weeks of the school year, all of the class were grouped into a single reading level. According to Appellant's testimony, this was done because the lower level children had completed their reading material and she felt that the class was capable of being combined into one group. According to the District, Appellant's decision to form a single reading group, for children capable of reading at a wide range of levels, constituted persistent negligence.

The District contends that Appellant's failure to make appropriate arrangements for the differences in the children she taught, justifies her dismissal. The District argues:

> While in a younger, more inexperienced teacher such a course of conduct might be viewed as incompetence, it is submitted that, in a teacher with such broad experience as Ryan in the District, the course of conduct exemplifies a continuous and progressive neglect of duty to afford an adequate education to the children in her charge. The District's Brief on Behalf of the Administration of the Lackawanna Trails School District in Opposition to Appeal, at page 17.

The District provides no authority for this novel contention. We see no merit in the suggestion that Appellant's experience creates a duty which might not otherwise exist. As stated in Gene A. Pasekoff v. Armstrong School District, Teacher Tenure Opinion of the Secretary of Education, No. 3578,:

> . . . to support a charge of persistent negligence, the Board must demonstrate a duty which appellant was to perform, and that the duty was adequately communicated to appellant.

The District has offered no evidence of an established school policy that was violated by Appellant's single reading group. Although testimony indicates that a level of more advanced reading books existed, there is no evidence that such books were available for Appellant's class. Indeed, testimony indicates that on the basis of her experience at the beginning of the school year, Appellant had every reason to believe that such books would not be readily available for her class. On the basis of the record, we are hard pressed to view the Appellant's decision to form a single reading group as persistent negligence. Accordingly, we find there to be no substantial evidence adequate to dismiss the Appellant on this charge.

Finally, the fourth basis for Appellant's dismissal relates to her alleged failure to adequately supervise the children under her direction. This allegation is based upon charges that Appellant failed to institute and enforce a system to ensure that her students would not leave her classroom without proper supervision; that students under Appellant charge were discovered out of the classroom during class hours without any supervision; and, that on one occasion, Appellant permitted a group of students in her charge to play on the Benton Elementary School playground and to utilize playground equipment without any supervision for a period of at least ten minutes. The record fails to support these allegations with substantial and convincing evidence.

The testimony of Appellant's students, called by the administration, indicates that the classroom rule existed which required that only one student leave the classroom at any time, but that on occasion more than one child would sneak out of the classroom, apparently unbeknownst to Ryan. The testimony also indicates however, that this policy was later amended to require that the students sign before their departure, presumably to correct its abuse by the students.

The record also indicates one instance when a group of students were observed unsupervised on the playground. The testimony of Mr. Williams, the school principal, was that the children were without supervision for at least ten minutes. However, Appellant's testimony suggests that she had been observing the children from the school doorway where she was waiting with several other children for their bus, except for a brief period of time during which she used the lavatory facilities. Mr. Williams testified as to his great concern with the safety of the unsupervised children; however, he also acknowledged that he did not take time on that occasion to rebuke Appellant for negligent conduct. He admitted that he did not raise the subject to her until several days later. In light of his stated concern about the gravity of Appellant's alleged negligence, it is difficult to imagine the reason for his delay in commenting to her about conduct. Nonetheless, the record in this matter provides substantial evidence of one incident during which Appellant left sixth-grade children unsupervised on the playground for a short period of time. There is no question that such conduct was negligent in that it subjected the children to the potential of grave harm from their unsupervised use of dangerous playground equipment. The issue is whether such an incident in and of itself justified Appellant's dismissal on the charge of persistent negligence.

The case law indicates that as a "general proposition" persistent means "continuing" or "constant" and that "persistency" involves either a series of individual incidents or one incident carried on for a substantial period of time. Lucciola v. Commonwealth, 25 Pa. Cmwlth. 419, 360 A.2d 310 (1976). With that definition in mind, we do not believe the requirement of persistency has been met in the instant case. We do not find that the School District has met its burden to show a continuing course of negligent conduct. The mere allegation of repeated incidents without credible evidentiary support does not warrant Appellant's dismissal.

On the basis of the record before us, we do not see substantial evidence that Appellant engaged in a continuing course of negligent conduct. There has been no showing of Appellant's persistent refusal to be responsive to the legitimate requests of the Administration or to abide by school laws. There has been no evidence of an attitude on the part of Appellant of arrogant disregard of the school policy or total disregard for the safety of the students under her case. Accordingly, we find insufficient evidence in the record to support the charge of persistent negligence, and we make the following:

O R D E R

AND NOW, this 4 day of January , 1982, it is hereby Ordered and Decreed that the decision of the Lackawanna Trail Schol District dismissing Appellant on the grounds of persistent negligence be reversed.

Rbt G. Scanlon
ROBERT G. SCANLON
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF EDUCATION

Raymond M. Pecuch, :
Appellant :
:
v. : Teacher Tenure Appeal No. 23-79
:
California Area School :
District, :
Appellee :

OPINION

Raymond M. Pecuch, Appellant herein, has appealed from the action of the California Area School District removing him from his position as Principal of the California Area Middle School and appointing him as Assistant Principal at the California Area High School which action, taken without his consent, he contends is a demotion in position.

FINDINGS OF FACT

1. Appellant, Raymond M. Pecuch, is a professional employee of the California Area School District, and is duly certified as a secondary school principal in the Commonwealth of Pennsylvania. He has served as a principal in the California Area School District for the past fifteen years, and was appointed as principal of the California Area Middle School in 1977. Transcript of Hearing before School Board (TB) 19, Transcript of Hearing on Appeal (TA) 19, 20, 28.

2. The California Middle School consists of grades six, seven, and eight. The Middle School building also houses grades three, four and five. Grades one and two are housed in the Phillipsburg Elementary School; grades nine, ten, eleven, and twelve are in the High School. On August 15, 1979, Appellant was Principal of the Middle School; Mickey Bodnar was Elementary School Supervisor at the Middle School, and John Kupets was Principal of the High School. TA 20, 22.

3. In February 1977, the California Area School District submitted an application for pre-approval to establish a middle school to the Pennsylvania Department of Education. The application was compiled by Appellant and named Appellant as Building Principal. The application was subsequently approved by the Department of Education. Pecuch Exhibit No. 2, TA 21.

4. The Professional Personnel Certification and Staffing Policies and Guidelines of the Pennsylvania Department of Education, 1975, provide that persons duly certified as elementary or secondary principals may be assigned as principals at an approved middle school. Appellant is a duly certified secondary principal. Appellant is not certified as an elementary principal. Appellant's Exhibit H, TB 19, TA 26.

5. As principal of the Middle School, Appellant occupied an office known and designated as the "Principal's Office", and had no superior at the Middle School building. He was responsible for supervising all the professional employees for grades three through eight; he signed requisition orders as Principal of the Middle School; he was responsible for

curriculum development; he was in charge of public relations and the athletic program; he was responsible for assigning substitute teachers; he was involved with the publication of the middle school yearbook; he was responsible for fire and other drills at the middle school building. TB 32, 35-38, TA 29, 30.

6. As principal of the middle school, Appellant did not rate the teachers in grades three, four and five, in the school building because he was not duly certified as an elementary school principal. As a duly certified secondary school principal he did observe and rate teachers in grades six, seven and eight. TB 19, 20.

7. During Appellant's period as principal of the middle school, Mickey Bodnar, a duly certified elementary principal, was responsible for observing and rating teachers in grades three, four and five. TB 21, TA 29.

8. Prior to August 15, 1979, no objection or complaint was ever made to Appellant by either the School Board or by Dr. James R. Johnston, the Superintendent of the School District, regarding the division of responsibility for observing and rating the teachers in the middle school Building. TA 29.

9. On August 15, 1979, the School Board adopted motions stating "that Mr. Pecuch be named as Assistant Principal at the Senior High School:, that Mr. Bodnar be named Principal--kindergarten to 8th grade", and "that [the Board] create the position of Assistant Principal--kindergarten

to 8th grade." School District Exhibit C.

10. On or about August 22, 1979, Appellant physically moved into an office at the high school. The office he occupied was known and designated as the "Assistant Principal's Office". The Appellant began to work under the direction and pursuant to orders of John Kupets, Principal of the High School. Mr. Kupets occupied the office known and designated as the "Principal's Office". TA 29-31.

11. By letter of August 23, 1979, Appellant, through his attorney, notified the School Board that he did not consent to the proposed transfer in position which he contended was a demotion, and demanded a hearing before the School Board in accordance with the Pennsylvania Public School Code.

12. On August 29, 1979, John Kupets was granted a sabbatical leave by the School Board and commenced that leave two days later. After Mr. Kupets' departure, Appellant continued to act as Assistant Principal, working closely with, and under the supervision of Dr. Johnston. TA 29, 32, 42.

13. By letter of September 10, 1979, Appellant through his attorney, made a second demand for a hearing. Pecuch Exhibits No. 4 and No. 5.

14. By letter of September 12, 1979, Dr. Johnston advised Appellant "to assume immediately all administrative duties at the high school until notified to the contrary." Appellant was never elected or transferred to the position of principal at the high school by School Board action. School District Exhibit D, TB 55, 56, TA 33-35, 42.

15. Appellant remained at the high school until September 20, 1979 at which time, on the advice of his doctor, John C. Shaver, M.D., he ceased working. As of January 30, 1980, the date of oral argument and testimony before the Hearing Examiner, Appellant remained out on sick leave. TA 32, 33.

16. During the period from September 4 to the 20th, Appellant did not have the title of "Principal" at the high school. At that time, Mr. Kupets was on leave and there was no principal at the high school. TB 55, TA 2, 33.

17. By letter of September 20, 1979 from the California Area School District signed by Shirley Zahand, President, and John J. Vitchoff, Secretary, Appellant was advised that in accordance with his request, he would be granted a hearing in accordance with the School Code. The School Board further advised Appellant that in their opinion no demotion had in fact occurred, but that a move of certain administrative and supervisory personnel was made in the best interest of the School District. School District Exhibits A and B.

18. On September 24, 1979, a hearing was held before the School Board. Appellant was ill and did not appear, but was represented by counsel who requested the right to a continuance should Appellant's testimony be needed. Dr. Johnston was the only person who testified.

19. Dr. Johnston testified that the transfer of Appellant to the position of Assistant Principal at the high school, the appointment of Mr. Bodnar as Principal--kindergarten to 8th grade and the creation of a position

of Assistant Principal--kindergarten to 8th grade reflected a reorganization of a portion of the entire school system. No plan was submitted to the Department of Education regarding such a reorganization. TB 15-17, 44.

20. Dr. Johnston testified that all reassignments in position made by the School Board were all lawful. He testified that as principal of the middle school, Appellant was unable to rate elementary teachers in the middle school building. TB 17-20.

21. Dr. Johnston testified that the Appellant had in no way been derelict in the performance of his professional duties, and to his knowledge Appellant had never received an unsatisfactory rating as a teacher or principal. TB 31.

22. Appellant did not suffer any economic loss as the result of the transfer; his salary and fringe benefits were not decreased or effected thereby. TB 20, 21.

23. On or about October 17, 1978 medical statements dated September 4, 1979 and October 12, 1979 regarding Appellant's medical condition and his need to continue sick leave until at least December 1, 1979 were provided to the school board.

24. On October 17, 1979, the School Board voted to hire Thomas Knight as "Temporary Assistant Principal" at the senior high school during the absence of Mr. Pecuch. Pecuch Exhibit K.

25. By letter of October 25, 1979, Appellant, through his attorney, advised the School Board, that he had not received notice of a decision on Appellant's challenge to the transfer in position and that unless such decision was received within ten days, Appellant would file an action of mandamus in the Washington County Court of Common Pleas. On November 26, 1979, such an action was filed. Pecuch Exhibit J.

26. On November 20, 1979 further information regarding Appellant's medical condition was sent to Dr. Johnston and Mrs. Zahand, President, Board of School Directors. Pecuch Exhibits D and E.

27. By letter of November 23, 1979 from Dr. Johnston, Appellant was advised that the School Board had passed a motion on November 20, 1979 stating that:

> "Pending an immediate response to the recent letter which was sent from the Superintendent to Mr. Pecuch concerning his medical status, we terminate Mr. Pecuch's relationship with the school district, specifically his salary and fringe benefits". Pecuch Exhibit F.

28. There is no dispute that Appellant's relationship with the school district, terminated per letter of November 23, 1979, has been reinstated and that the issue of dismissal is therefore moot.

29. By letter of November 23, 1979 from Dr. Johnston, Appellant through his attorney was advised that:

> "The California Area Board of School Directors has directed, as a result of the 24th of September hearing, the assignment of Mr. Pecuch to temporary administrative duties

at the high school as outlined by the Superintendent and consistent with his certification. Pecuch Exhibit G.

30. On November 29, 1979 Appellant filed an Appeal from Demotion and Dismissal with the Secretary of Education pursuant to 24 P.S. §11-1131.

31. On January 30, 1980 a hearing on the Appeal was held before a Hearing Examiner acting on behalf of the Secretary.

32. Additional testimony was taken at the hearing on Appeal pursuant to regulations at 22 Pa. Code §351.8.

DISCUSSION

The Appellant contends that he was demoted without his consent, without a prior hearing, without a detailed statement of charges, and without adherence in other respects to the requirements of a lawful demotion under the School Code, 24 P.S. §11-1151. Appellant further contends that the demotion was an arbitrary and capricious action by the School Board, and that Appellant is therefore entitled to be reinstated to his former position as Principal of the California Area Middle School. It is the contention of the School District that no demotion in fact occurred, and that the transfer of Mr. Pecuch to a position at the California Area High School was a reassignment to a position equal in responsibility made in accordance with the judgment and discretion of the Board.

The August 15, 1979 action of the School Board transferring Appellant from his position as Principal of the Middle School to Assistant Principal at the High School clearly was a demotion. It removed Appellant from his position as the chief administrator at the middle school building to a secondary position at the High School. It is irrelevant that his salary remained the same: his status and authority were reduced. The School District argues that after the principal at the high school began his sabbatical leave, Appellant was assigned to the position of principal at the high school and therefore he suffered no demotion. In support of this the Board points to the September 12, 1979 letter from Dr. Johnston instructing Appellant to "assume . . . all administrative duties at the high school," and the November 23, 1979 letter characterizing Appellant's new position as an assignment "to temporary administrative duties at the high school". However, the testimony of Dr. Johnston at the September 24, 1979 hearing indicates that the Appellant had not been assigned to the position of principal of the high school; the principal was on sabbatical leave. Further, when the School Board acted on October 17, 1979 to replace Appellant, who was out sick, they appointed a temporary assistant principal, not a temporary principal or temporary chief administrator. This is additional evidence that Appellant was not viewed by the School Board as having full administrative authority for the high school. Appellant's transfer from a position as chief administrator to one as an assistant was a demotion in status.

Appellant's illness, and the teacher's strike which occurred during his brief time of service at the senior high school, cloud the picture of his exact duties and responsibilities in his new position. But even were he to have served as de facto principal at the high school, this would still have been a temporary principalship. Mr. Kupets remained as principal, entitled to resume that position at the end of his sabbatical leave. The temporary character of Appellant's position as compared to his former permanent status also resulted in a reduction in importance and prestige and, hence, a demotion. Department of Education v. Kaufmann, 21 Pa. Commonwealth 89, 343 A.2d 391 (1975).

Once the School Board's action is considered a demotion, the Board has the duty to make its reason(s) for the demotion clear and apparent. *Smith v. Darby*, 388 Pa. 301, 130 A.2d 661 (1957), *Tassone v. School District of Redstone Township*, 108 Pa. 290, 183 A.2d 536 (1962).

The School Board herein has indicated its reason was to reorganize the administration of its school system for the purpose of more efficient utilization of its certified administrators. The reassignment of Appellant and Mr. Bodnar was a result of a consolidation of the administration of the Middle School and the kindergarten to 5th grade program. Mr. Bodnar, previously the Elementary School Supervisor and a certified elementary principal, was placed in charge of the entire elementary program--kindergarten to 8th grade. A new position of assistant principal--kindergarten to 8th grade was created. Appellant, who was not certified as an elementary principal, was placed in the position of Assistant Principal of the High School which was consistent with his own certification as a secondary principal.

The law is clear in Pennsylvania that the School Code does not prohibit a school board from demoting a professional employee or reassigning a professional employee to another class or school in accordance with its judgment and discretion. *Smith v. Darby, Supra*. School boards have the power to assign their personnel to other positions and a professional employee has no vested right in any particular position. *Smith, Id*; *Appeal of Santee*, 307 Pa. 601, 156 A.2d 30 (1959); *Wesenberg Case*, 346 Pa. 438, 31 A.2d 151 (1943); Commonwealth ex. rel Wesenberg v. Bethlehem School District, 148 Pa. Super 250, 24 A.2d 673 (1942). Also, the courts have consistently upheld the right of a school board to abolish a position or office, transfer and/or assign an employee to a new position and reorganize and realign staff for more efficient administration. Smith v. Darby, Supra; Lakeland Joint School District v. Gilvary, 3 Pa. Commw. 415, 283 A.2d 500 (1971); Bilotta v. Secretary of Education, 8 Pa. Commw. Ct. 631, 304 A.2d 190 (1973); Lucostic v. Brownsville Area School District, 6 Pa. Commw. Ct. 587, 297 A.2d 516 (1972); Tassone v. School District of Redstone Township, Supra.

In the instant case, the school board has met its responsibility of showing the reason for its action. It contends that efficient administration was the reason for its action. The burden then shifts to Appellant:

> "For the demotion to be overturned on other than procedural grounds, the employee has the burden of proving the action to be arbitrary, discriminatory, or founded upon improper considerations." (Citations Omitted) The Board of Public Education of the School District of Pittsburgh v. Thomas ___ Pa. Commw. Ct. ___, 399 A.2d 1148 (1979).

The burden is a heavy one but Appellant has met it.

Whether a demotion is arbitrary is premised upon whether there is a reasonable basis for the Board's action.

> "An arbitrary action is one based on random or convenient selection rather than on reason. Moreover, an action is not arbitrary merely because it does not effectuate a policy in the most effectuate manner, so long as it has some rational basis." Thomas, 399 A.2d at 1150.

The Board's alleged basis for reassignment of Appellant was the desire to consolidate responsibility for professional employee supervision. The Board contends Appellant's reassignment was part of a reorganization plan. However, the board's actions did not consolidate administrative responsibility and there is no evidence of planning for a school district reorganization. Instead of a Middle School Principal they have a Principal--kindergarten to 8th grade. Instead of an Elementary School Supervisor they have a new position--Assistant Principal--kindergarten to 8th grade. Where there were two administrative positions there are still two administrative positions. The board appears to have done nothing but change the names of titles of administrative positions. There still exists an assistant principal position as well as a principal position at the high school. These facts do not show an overall consolidation of administrative positions as claimed by the School Board.

The Board has shown no plan for reorganizing administration in the district. Quite the contrary the Board's actions appear to be without any coherent plan. Appellant has shown that the reason advanced by the Board is arbitrary. Thus the Appellant's demotion must be overturned.

Although Appellant has prevailed on the argument of arbitrariness we note several other points which are worthy of our discussion. The arguments of Appellant suggest that the demotion was improper because the demotion was not based on any deficiency or failing on his part. We must note that this argument fails to recognize that a School Board may demote an employee regardless of his capabilities or job performance.

Numerous demotions have been upheld by the courts which were clearly not disciplinary in nature. See, for example, Smith v. Darby, Supra; Tassone v. School District of Redstone Township, Supra; Lucostic v. Brownsville Area School District, Supra, Bilotta v. Sec'y of Education, Supra. The demotion in the instant case was not premised on Appellant's job performance; poor job performance is not a legal requirement to sustain a demotion. The record shows that the School Board considered Appellant a qualified and capable supervisor.

We must also note that this record is replete with repeated instances of procedural laxity and impropriety on the part of the School Board such as could require sustaining Appellant's appeal on procedural grounds: Appellant was not afforded a hearing prior to his demotion; Appellant's first request for a hearing was ignored; the hearing was not scheduled until after his second request; Appellant was not provided with a full and detailed statement of charges prior to his demotion; Appellant was not given timely notice of the Board's decision after the hearing on September 24, 1979; Appellant did not receive notice of the Board's decision until after he filed a Complaint in Mandamus in the Court of Common Pleas of Washington County on November 26, 1979 more than two months after the date of the hearing before the School Board; by letter of November 23, Appellant was terminated by the School Board without any regard for the procedures required under the School Code; and also by letter of November 23, Appellant was assigned to a position which we have determined to also be a demotion from his position as middle school principal.

There is no doubt that Appellant's procedural rights in this entire matter have been repeatedly ignored or violated by the School Board. It is settled law in this Commonwealth that the non-consensual demotion of a professional employee cannot become effective until after a hearing before the school board, Smith v. Darby, Tassone v. School District of Redstone Township, Supra. Although the hearing in this case was untimely with regard to the effective date of his demotion, we do not have a complete absence of compliance with the procedural mandates of the school code. Appellant has now been given a hearing. To remand on procedural grounds for another hearing after proper notice of charges would accomplish nothing but delay. Appellant has already shown he can prevail on the merits.

Having determined that Appellant must be restored to his position as a principal there is no additional relief for Appellant's procedural injury. Appellant's salary was not reduced, therefore he suffered no lost wages during the period prior to the Board's completion of the hearing process with regard to his demotion. We have no authority to award Appellant reimbursement for the attorney's fees he has expended to correct the procedural laxity of the Board. School District of the City of York v. Allison, ___ Pa. Commw. ___ 406 A.2d 1196 (1979). It is true that no hearing before the Board has been held on the termination of Appellant on November 23, 1979 or the November 23, 1979 assignment to "temporary administrative duties at the high school." Counsel for the Appellant has conceded that no purpose would be served by remanding this case to the school board for another hearing on these matters. As of the date of the hearing of the appeal before the Department of Education, Appellant had not performed any duties at the high school since his November 23, 1979 assignment and the termination by the School Board has apparently been mooted by subsequent events. We do not condone the procedural errors committed below by the School Board, but there exists no remedy for the harm suffered beyond reinstatement.

In accordance with the following, we make the following:

ORDER

AND NOW, this 9th day of September, 1980, it is hereby Ordered and Decreed that the Appeal of Raymond M. Pecuch from the action of the Board of School Directors of the California Area School District demoting Mr. Pecuch from his position as Principal to the position of Assistant Principal is sustained.

Robt. G. Scanlon

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

FREDERICK W. BROWNE, :
Appellant :
:
v. : Teacher Tenure
:
ABINGTON SCHOOL DISTRICT, : Appeal No. 24-79
Appellee :

OPINION

Frederick W. Browne, appellant herein, is appealing the decision of the Board of School Directors of the Abington School District which dismissed appellant as a professional employee of the district on grounds of incompetency, persistent negligence and persistent and willful violation of school laws pursuant to §1122 of the Public School Code. The Adjudication resulted from the recommendation and charges of the Superintendent of the Abington School District lodged on February 13, 1979, and after fourteen public hearings before the Board between June 5 and November 8, 1979. This appeal followed.

FINDINGS OF FACT

1. Mr. Browne is a tenured professional employee, certified to teach secondary English and has been employed

by the School District for 13 years (TR-599-600, 601, 1032).[1]

2. During the 1977-1978 and 1978-1979 academic years, Mr. Browne was employed as a senior English teacher at the Abington High School, South Campus (the "High School") (TR-32, 600-601).

3. Senior English classes are divided into Levels 1, 2 and 3 based upon an individual student's reading and writing skills and abilities (S-1; TR-32, 268, 603). In addition, there is an honors program (S-1; TR-32, 603).

4. In the 1977-1978 school year, Mr. Browne was assigned to teach one Level 1 senior English class, two Level 2 senior English classes and two Level 3 senior English classes (TR-604).

5. Mr. Norman Schmid is the principal of the High School and is charged with the responsibility of evaluating the performance of each staff member (TR-55-56, 58).

6. The certified evaluators at the High School include, in addition to Mr. Schmid, Mr. William J. Lucian, Assistant Principal, with responsibilities for the observation and evaluation of the faculty (TR-414-415); Mr. G. Donnon McGinley, Assistant Principal, with responsibilities for student discipline and faculty

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1. All references to the transcript of this hearing will be preceded by the prefix "TR". All pages of the transcript are numbered consecutively regardless of volume. Exhibits are marked to reflect the party that introduced it -- Board ("BD"), Superintendent ("S") or Browne (BR").

observation (TR-444-445); Dr. Elayne Zimmerman, Assistant Principal with responsibility for discipline and faculty observation (TR-519-521); and Mr. Charles E. Schneller, Jr., the English Department Chairman (TR-256-257, 266-267, 269). Following any observation, the observer is required to prepare an Observation Report which generally describes the class activity, and sets forth commendations and specific recommendations for improvement of teaching methods. A copy of this report is transmitted to the teacher who is entitled to meet with the observer concerning its contents.

7. The Superintendent of Schools in the School District is Dr. Carl B. Hoffman (TR-27). The Superintendent is responsible for the overall administration of the School District, including the final evaluation of teachers employed in the School District (TR-28, 34-35).

8. As to each ability level in the High School English Department, a Curriculum Guide ("Guide") was developed in June, 1976 which establishes objectives and minimum course requirements (S-1; TR-28-31, 268-269).

9. The Guide was developed by a committee of English faculty members under the overall supervision of Mr. Schneller, together with contributions from the entire faculty of the English Department (TR-41-42, 56, 270-271, 521, 653). The Guide was adopted as the policy of the School District by the Superintendent and has not been subsequently amended in any respect (TR-30-31, 56, 1045).

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10. The Guide provides for "a sequential, ordered English program" (S-1; TR-295-297, 298, 1375). The importance of this sequential development has been discussed at various departmental meetings (TR-297-298, 963-964).

11. The Guide establishes the minimum requirements that must be met so that continuity appears from Junior to Senior year, so that planning can take place, and so that teaching methods and techniques can be shared (S-1; TR-57, 1209, 1526).

12. The number of required readings in each genre, by ability level, as specified by author in the Guide are as follows:

LEVEL 1:
Novels - 5
Drama - 4
Poetry - 7
Short Story - 1
Non-fiction - 3

LEVEL 2:
Novels - 3
Drama - 2
Short Stories - 7
Poetry - 11

LEVEL 3:
Novels - 2
Drama - 2
Short Stories - 3
Non-fiction - 2
Poetry - 4

(S-1 at 25-26, 30, 35-36).

13. The required readings at each ability level were to be covered without substitution or elimination unless otherwise approved by the department chairman (TR-48, 1043-1044).

14. The Guide requires that students at Levels 1 and 2 be assigned a minimum of eight writing experiences and one

research paper and students at Level 3 be assigned a minimum of eight writing experiences and one extended paper (S-1 at 3; TR-357, 1073-1074).

15. Departmental policy distinguishes between paragraphs and compositions and contemplates that the required and supplementary writing experiences be multi-paragraph compositions, rather than single paragraphs or lines of verse (S-1 at 3, 9, 26; TR-290, 1075, 1077, 1078-1080, 1484-1485).

16. Responses to questions on either the mid-year or final examination are not writing experiences as defined by the Guide, principal's directives and departmental policy and, therefore, are not to be counted toward accomplishment of the minimum or supplementary requirements (S-1; TR-290, 363-364, 370, 383-386, 1487-1488, 1527).

17. The faculty members of the English Department, including Mr. Browne, were fully aware of the requirements of the Guide and all policies and directives related thereto, and were fully expected to meet those requirements (TR-653, 1043).

18. Mr. Browne failed to assign any writing during the 1977-1978 school year until October or November and then only required the writing of a single paragraph (TR-663-664). This assignment did not constitute a writing experience within the meaning of the Guide (TR-290).

19. On several occasions during the fall of 1977, Mr. Schneller advised Mr. Browne that he had not assigned sufficient or satisfactory writing experiences to his students, especially

the Level 1 seniors (TR-658-659, 1490), which Mr. Browne later admitted to Mr. Schmid. (BR-10; TR-1091-1092).

20. As Mr. Browne admittedly was aware, School District policy requires that all faculty members prepare up-to-date lesson plans and insert them in the plan book at least a week in advance of the period covered by that lesson plan (TR-419, 1436, 1593).

21. For a six-week period, from November 2, 1977 through at least December 13, 1977, Mr. Browne's lesson plans if prepared at all, were not inserted in the plan book (BD-2; S-15; TR-416, 1434, 1593).

22. As Mr. Browne was well aware, School District policy requires that all teachers present their lesson plan book and grade book to an observer upon his entry into the classroom (TR-1184, 1185).

23. On December 13, 1977, Mr. Browne was observed by Mr. Lucian during a Level 1 class. Mr. Lucian later prepared an Observation Report with respect thereto and forwarded a copy to Mr. Browne (S-15; TR-415).

24. In violation of School District policy, Mr. Browne failed to present his plan book or grade book to Mr. Lucian during that observation (S-15; TR-415-416).

25. On the date of Mr. Lucian's observation, Mr. Browne assigned the second writing assignment of the school year to that class (S-15; TR-416).

26. Mr. Browne's plans, which Mr. Lucian was able to review following this class, were unsatisfactory in that they were

"sketchy or non-existent" and failed to distinguish between ability levels (S-15; TR-416).

27. Mr. Browne never requested a conference with Mr. Lucian with respect to the report and never questioned any of its recommendations or criticisms until the board hearing (S-15; TR-422, 799, 1308).

28. On December 15, 1977, Mr. Browne's Level 1 class was observed by Mr. Schneller, who later prepared an Observation Report with respect thereto and forwarded a copy to Mr. Browne (BD-3).

29. Mr. Browne failed to present his grade book to Mr. Schneller, as required, upon Mr. Schneller's entry into the classroom (BD-3).

30. At the time of this observation, Mr. Browne had not begun the required writing program as he had failed to assign any writing experiences to these Level 1 students (BD-3).

31. On January 19, 1978, Mr. Schmid observed one of Mr. Browne's Level 3 classes and thereafter prepared an Observation Report, a copy of which was forwarded to Mr. Browne (BD-4).

32. At that time, despite prior recommendations, Mr. Browne still had failed to adhere to the required curriculum at any level and, specifically, Mr. Browne had failed to assign more than two writing experiences to any of his classes (BD-4).

33. Mr. Schmid recommended that "[s]teps need to be taken to remedy this situation at once, but in an orderly fashion so that the students are not suddenly inundated in compositions" (BD-4).

34. On January 24, 1978, one of Mr. Browne's Level 3 classes was observed by Mr. McGinley, who thereafter prepared an Observation Report and forwarded a copy to Mr. Browne (S-18; TR-450-451).

35. Mr. Browne again failed, in violation of school policy, to present either his grade book or plan book to Mr. McGinley upon his entry into the class as an observer, although Mr. Browne was conducting individual student conferences and not relying upon either book (S-18; TR-451).

36. During the first quarter of the 1977-1978 school year, Mr. Browne admittedly had assigned no writing experiences but had only given a one paragraph writing assignment (S-2 & 2A; BR-10; TR-1484, 1489).

37. In order to meet the minimal requirements of the Guide by the end of the semester, Mr. Browne had been required to assign an inordinate number of writing experiences to his students during that period of time (S-2 & 2A; TR-1489-1490).

38. On or about February 23, 1978, following the issuance of Mr. Schmid's draft Teacher Evaluation Report of Mr. Browne on February 15, 1978 (BR-2; TR-667-668), Mr. Schneller had a meeting with Mr. Browne in order to review its contents as well as Mr. Browne's grade book and his students' composition folders (S-2 & 2A; TR-1483-1490). Mr. Schneller advised Mr. Browne that his first semester performance had been unsatisfactory (S-2 & 2A; TR-1490).

39. During this entire period of time, Mr. Browne was fully aware that Mr. Schmid, Mr. Schneller and his other supervisors were dissatisfied with his performance and specifically with the amount of required writing experiences accomplished in the first quarter (TR-1094).

40. On or about March 1, 1978, based on all of the earlier Observation Reports of Mr. Browne, as well as Mr. Schneller's conference with Mr. Browne and subsequent report to Mr. Schmid, Mr. Schmid prepared and issued an evaluation of Mr. Browne's performance during the first semester of the 1977-1978 academic year and assessed Mr. Browne with a final evaluation of "unsatisfactory" (S-2 & 2A; TR-72) which was reviewed by Dr. Hoffman and approved by him (TR-35).

41. Mr. Browne's performance during the first semester was rated as "unsatisfactory" because:

> "For the period from September 27 through December 15, Mr. Browne ignored the minimum writing requirements established by the department. Mr. Browne's work has been satisfactory in routine matters pertaining to the classroom, but he has failed to keep his planbook up-to-date as required. Failure to teach the prescribed materials and a lack of day-to-day progress in the classroom leave much to be desired. While efforts to correct the writing deficiencies have been made by this date, it does not alter the fact that virtually no student writing was done for the first three months of school."

and

> "Mr. Browne has not proved to be an effective teacher of English thus far this year in that he has not taught composition as required, causing student questions and concerns on the part of parents and counselors. Mr. Browne has thus far registered one unsatisfactory marking period and one marking period of corrective action. Neither should have occurred."

(S-2 & 2A; TR-1431-1433).

42. Following the assessment of this unsatisfactory evaluation, Mr. Schmid prepared Plans to Improve with respect to Mr. Browne's performance (S-8; TR-81-82). These Plans to Improve included the following:

> "2. Mr. Browne will make every effort to keep an adequate and accurate lesson plan book that is up-to-date.
>
> "3. Mr. Browne will adhere to the curriculum and teach the materials prescribed by it.
>
> "4. Mr. Browne will continue to stay on target regarding the student writing requirements in all courses." (S-8)

43. Mr. Browne was next observed by Mr. McGinley on April 12, 1978 during a Level 3 class, following which Mr. McGinley prepared an Observation Report and forwarded a copy to Mr. Browne (S-19; TR-452, 1256).

44. Notwithstanding his recent unsatisfactory evaluation and the outstanding Plans to Improve, Mr. Browne's lesson plans continued to be too general to be of any value to a substitute or supervisor and provided no guidelines as to what was to be accomplished or how (S-19; TR-454, 1256).

45. On April 24, 1978, Mr. Browne's Level 2 class was observed by Mr. Schneller, at which time Mr. Browne's writing assignments, grade book and lesson plans continued to be unsatisfactory. An Observation Report was thereafter prepared by Mr. Schneller and forwarded to Mr. Browne (S-25; TR-1437).

46. On May 5, 1978, Mr. Lucian observed Mr. Browne's preformance in one of his Level 3 classes, and then prepared an Observation Report and forwarded a copy to Mr. Browne (S-16; TR-416-417).

47. During almost the entire period of this observation, Mr. Browne only performed certain administrative work, permitting student conversation and whistling and general disorder, thus wasting a substantial amount of instructional time (S-16; TR-417).

48. Although Mr. Lucian made clear that a conference was available with respect to the Observation Report, Mr. Browne did not then take advantage of that offer or, in any way, take issue with that report (S-16; TR-422).

49. Based on Mr. Browne's performance during the entire 1977-1978 academic year and all of the observations of his performance, on June 13, 1978, Mr. Schmid assessed a "minimal" rating as Mr. Browne's final evaluation, which evaluation was reviewed and approved by Dr. Hoffman (S-3; TR-37-38, 72-73).

50. During the 1978-1979 school year, Mr. Browne was assigned to teach one Level 1 senior English class, two Level 2 senior English classes and two Level 3 senior English classes (TR-604).

51. Mr. Browne applied for and was granted a sabbatical leave for the second semester of the 1978-1979 school year and, accordingly, would have to be replaced by a substitute teacher during that semester (TR-173-174, 260, 603-604).

52. On September 19, 1978, Mr. Browne's Level 1 class was observed by Dr. Zimmerman, who later prepared an Observation Report and forwarded a copy to Mr. Browne (S-20; TR-522-523).

53. The pace of instruction, as well as Mr. Browne's time-consuming review of a vocabulary unit, was not considered satisfactory. (S-20; TR-523-525, 1540-1541).

54. On several occasions during the first semester of the 1978-1979 school year, Mr. Browne refused to provide his plan book and grade book to Mr. Schneller as requested (TR-336-339, 398).

55. Notwithstanding prior criticisms in Observation Reports and in the Teacher Evaluations, Mr. Browne continued to prepare unclear and inadequate lesson plans in that they contained abbreviations which were not readily identifiable to substitutes and notations indicating class discussions without further indicating the purpose to be accomplished or the method thereof (TR-1206, 1233).

56. On November 6, 1978, Mr. Schneller observed one of Mr. Browne's English Level 2 classes (S-12; TR-283).

57. Following his observation of Mr. Browne on November 6, 1979, Mr. Schneller held a series of conferences with Mr. Browne, concerning the Observation Report prepared by Mr. Schneller (TR-308-309, 312, 1494).

58. As of the date of Mr. Schneller's observation and subsequent report, an insufficient number of grades had been entered by Mr. Browne in his grade book to measure the students' progress during the first semester adequately, and the writing experiences assigned by Mr. Browne to this Level 2 class continued to be deficient (S-12; TR-324, 327, 329-330).

59. On December 19, 1978, Mr. Schneller examined student composition folders at each level taught by Mr. Browne and prepared an Observation Report based thereon (S-13; TR-285-286, 350-352).

60. At all levels, an unsatisfactory number of writing experiences had been assigned by Mr. Browne notwithstanding the preceding year's evaluations and Plans to Improve. In Mr. Browne's Level 1 and Level 3 classes, no writing experiences had been assigned since October 17, 1978 and October 25, 1978, respectively, and, in his Level 2 classes, no writing experiences had been assigned between October 26, 1978 and December 11, 1978 (S-13; TR-285-286).

61. Although the Observation Report made clear that a conference was available, if desired, Mr. Browne did not request a conference with Mr. Schneller nor in any way then contest the findings or conclusions contained in that Observation Report (S-13; TR-286, 288).

62. Mr. Schneller held a meeting on or about December 19, 1978 with Mr. Browne concerning fulfillment of the Guide requirements. As of that date, notwithstanding his prior ratings, Mr. Browne's reading assignments at all levels and in all categories were unsatisfactory since he again had failed to adhere to the required reading

program outlined in the Guide by failing to cover a sufficient number of works in the five categories at any level (S-6; TR-273-274).

63. Mr. Schneller advised Mr. Browne that the required readings had not been covered by Mr. Browne in a sufficient number during the first semester. (S-6; TR-274, 1497-1498).

64. On January 4, 1979, Mr. Browne's Level 1 class was observed by Mr. Lucian, who thereafter prepared an Observation Report and forwarded a copy to Mr. Browne (S-17; TR-419).

65. Once again, notwithstanding all prior recommendations, evaluations and Plans to Improve, Mr. Browne failed to present his plan book to Mr. Lucian during the observation because Mr. Browne allegedly had left the plan book at home (S-17; TR-419, 437).

66. As set forth in the faculty handbook, every teacher is required to keep his lesson plans up to date, complete and in his classroom at all times (TR-419-420).

67. Approximately one week after Mr. Lucian's observation, Mr. Browne finally produced his plan book and grade book for Mr. Lucian's review. At that time, although the Plan for Improvement required both up-to-date and complete lesson plans (S-8, 10; TR-421), Mr. Browne's lesson plans continued to be sketchy, incomplete and unsatisfactory, and no grades had been entered in the grade book for about six weeks (TR-419, 420, 1537).

68. On January 12, 1979, Mr. Schmid observed one of Mr. Browne's Level 3 English classes, and later prepared an Observation Report and forwarded a copy to Mr. Browne (S-5; TR-59).

69. As of the date of Mr. Schmid's observation, a number of grades had not been entered by Mr. Browne in his grade book and, moreover, Mr. Browne still had not entered the final grades for the first marking period (S-5; TR-64).

70. On January 17, 1979, Mr. Schmid observed one of Mr. Browne's Level 2 English classes and thereafter prepared an Observation Report, a copy of which was forwarded to Mr. Browne (S-7; TR-68).

71. As of that date, Mr. Browne had not entered any grades in his grade book since sometime before the Christmas vacation and had failed to mark and return his students' tests promptly (S-7; TR-69, 1007-1008).

72. Moreover, during a period of at least two calendar months, no writing work, much less writing experiences, had been assigned by Mr. Browne (TR-1143, 1161).

73. As of the date of the observation, Mr. Browne still had not adhered to or improved the reading requirements set forth in the Guide (S-7).

74. Although Mr. Browne was advised by Mr. Schmid that the study of a Shakespearian play only by showing a filmstrip or moviestrip for approximately one and a half periods did not satisfy the curriculum reading requirement, Mr. Browne refused to reconsider or to modify his approach and require the actual reading of the play (S-7; TR-70, 1058-1060, 1064-1065).

75. Because of Mr. Browne's impending sabbatical leave, on or about January 17, 1979, Mr. Schneller held another conference

with Mr. Browne to discuss the reading and writing requirements accomplished by Mr. Browne at that time, his proposed curriculum division and what requirements would have to be accomplished in the second semester by the substitute teacher (S-11, 27; TR-1499-1500).

76. As of January 18, 1979, Mr. Browne had failed to comply with the reading requirements set forth in the Guide as follows:

Level 1:

Required	Completed by Mr. Browne	Left for Second Semester Substitute to Satisfy Minimum Requirements
Novels-5	1	4 major novels
Drama-4	1	3 major plays
Poetry-7	2	5 major poets
Short Story-1	1	0
Non-Fiction-3	0	3

Level 2:

Required	Completed by Mr. Browne	Left for Second Semester Substitute to Satisfy Minimum Requirements
Novels-3	1	2 major novels
Drama-2	filmstrip only	2 major plays
Short Stories-7	0	all 7
Poetry-11	2	9

Level 3:

Required	Completed by Mr. Browne	Left for Second Semester Substitute to Satisfy Minimum Requirements
Novels-2	none of the required readings	2
Drama-2	filmstrip only	2
Short Stories-3	0	all 3
Non-Fiction-2	0	all 2
Poetry-4	1	3

(S-11, 27; TR-277-279, 1500-1504).

77. Similarly, as of January 18, 1979, the writing experiences accomplished by Mr. Browne's classes were deficient

and Mr. Browne failed to meet the minimal writing requirements set forth in the Guide because:

(a) Mr. Browne had assigned only two writing experiences to his Level 1 students;

(b) Mr. Browne assigned no writing experiences to his Level 1 students for over a three-month period, October 17, 1978 to December 19, 1978;

(c) Mr. Browne had assigned only 2 writing experiences to his Level 2 and Level 3 students;

(d) Mr. Browne had improperly attempted to include short, single paragraphs, verse forms and responses to questions on the mid-year examinations as writing experiences; and

(e) Mr. Browne misrepresented the nature of the writing assignments accomplished during the first semester to Mr. Schneller.

(S-11; 14, 27; TR-288-295, 365, 380, 388, 1486, 1544-1545).

78. Mr. Browne's performance during the first semester of the 1978-1979 academic year, in terms of both the minimum required readings and writing experiences, was unsatisfactory and in violation of the sequentially ordered Guide, leaving, as a result of his scheduled sabbatical leave, an undue burden for his replacement teacher as well as his students during the second semester in terms of the quantity of material to be covered and the quality of coverage possible (S-11; TR-295, 539, 1504).

79. On or about January 25, 1979, based on all of the Observation Reports of Mr. Browne, as well as Mr. Schneller's review of Mr. Browne's proposed curriculum division and report thereon, Mr. Schmid prepared and issued an evaluation of Mr. Browne's

performance during the first semester of the 1978-1979 academic year and assessed a final evaluation of "unsatisfactory" (S-4; TR-58-59, 74-79), which was reviewed and approved by Dr. Hoffman (S-4; TR-38).

80. Following the issuance of the January 25, 1979 unsatisfactory rating, and a complete review of Mr. Browne's performance during the 1977-1978 and 1978-1979 school years, the present charges were filed with the Board by the Superintendent on February 13, 1979 (BD-1; TR-39-40).

DISCUSSION

Appellant raises a number of substantive and procedural issues which he claims should invalidate his dismissal by the Abington School Board. Included are that the Appellant did not receive two consecutive unsatisfactory ratings as required by the regulations of the Pennsylvania Department of Education for dismissal on grounds of incompetency, failure to evaluate the appellant for pupil reaction as required by the Public School Code of 1979, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1123, and failure to issue the DEBE 333 rating form prescribed by the Department of Education and required by the rules of the District. All of these objections, of course, go to the issue of dismissal on grounds of incompetency.

Appellant further contends that he was denied a fair hearing because the school administrators introduced materials at the hearing which had been wrongfully retained by them, that they had suppressed evidence favorable to him, and denied him access to his personnel file. He also objects to the absence of evidence that all of the members of the board considered all of the evidence presented.

Lastly Appellant contends that the substantial credible evidence does not sustain the charges and that the evidence put forth goes only to the issue of competency. With this contention we cannot agree.

I.

Disposing first of Appellant's procedural complaints, we cannot find any unfairness or lack of procedural due process in the hearings held by the Board.

Appellant objects to the retention and introduction into evidence of two memoranda drafted by his department chairman commenting upon and evaluating his performance as a teacher. These memoranda were not placed in Mr. Browne's "official" file but were apparently kept in an "non-official" file by Mr. Schneller, the department chairman. This was in accordance with the provisions of the collective bargaining agreement of the district, and there is no evidence of record that the Appellant ever availed himself of his rights under the agreement to inspect his "non-official" file or was in any way denied his right to do so. Both the "official" and "non-official" files of the district were kept in accordance with the provisions of the collective bargaining agreement between the Abington School District and the Abington Education Association, Article III, Section E and F and Appellant had a right of inspection as to both. There is no basis to hold that relevant evidence at a dismissal hearing should be limited to Appellant's "official file".

We find no merit to Appellant's claim that the school administrators suppressed observation reports which were favorable to him. The reports in question, Board Exhibits 2, 3 and 4 were admittedly transmitted to Mr. Browne at the time of their preparation, they were inspected by Appellant in the spring of 1978, and were produced at a grievance hearing to which Appellant was party in August, 1978. Appellant had every opportunity to obtain the reports and introduce them into evidence at his dismissal hearings. Indeed, the reports ultimately were admitted into evidence and presumably considered by the Board in reaching their final determination.

Appellant also contends that the "findings" of the Board are defective because there is no evidence to show that the members of the Board considered all of the evidence presented. Appellant concedes that it is not required that each Board member hear all of the testimony. Acitelli v. Westmont Hilltop School District, 15 Pa. Cmwlth, 214, 325 A.2d 290 (1974). What is required is that the members who decide the matter consider all the evidence, Foley Brothers v. Commonwealth, 400 Pa. 548, 163 A.2d 80 (1960); that they all give a "full impartial and unbiased consideration to the record produced before the Board". Board of Public Education of the School District of Pittsburgh v. Pyle, 37 Pa. Cmwlth. 386, 390 A.2d 904 (1979). Appellant seems to contend that the Board must affirmatively show that the members have given the record the necessary consideration. We do not so understand the requirements of the above cases. The Board has represented in its adjudication that all board members engaged in a review of the record and in the absence of evidence to the contrary there is no reason to doubt it. Considering the undue number of public hearings, fourteen lengthy hearings over a period of five months amassing over 1,500 pages of testimony, the actual personal attendance of Board members in this case was admirable and there is no reason to presume that their review of the record would have been less conscientious.

II

As noted above, the Appellant contends that the evidence put forth by the School District goes only to the issue of competency. We find no merit in this contention. The Superintendent also charged and the Adjudication of the Board found that Appellant was guilty of conduct constituting persistent negligence and persistent and willful violation of the school laws within the meaning of Section 1122 of the Public School Code of 1949, supra. These are two distinct and separate grounds for dismissal under the Code and the evidence clearly sustains Appellant's dismissal on either or both.

A review of the Findings of Fact and of the evidence clearly indicates that Mr. Browne continuously during the 1977-1978 school year and during the first half of the 1978-1979 school year failed to assign to his classes either the prescribed number of

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reading experiences or the prescribed authors, that he failed to assign the required number of writing experiences, that he failed to keep his lesson plans in a form satisfactory to his supervisors and that he failed to keep his grade books current. His conduct in this regard can only be regarded as persistent negligence. See Lucciola v. Commonwealth, 25 Pa. Cmwlth. 419, 360 A.2d 312 (1976); Clairton School District v. Strinich, 50 Pa. Cmwlth. 389, 413 A.2d 26 (1980). It is equally clear that his conduct constituted willful and persistent violation of school laws. Violation or disobedience of school board rules and regulations and orders of supervisory personnel of a school district can be defined as persistent and willful violation of the school laws. Abridge School District v. Snyder, 346 Pa. 103, 29 A.2d 34 (1942). It includes violation of rules and orders of the employee's superior. Harris v. Secretary of Education, 20 Pa. Cmwlth. 625, 372 A.2d 953 (1977). It is inconceivable on the record of this case that Appellant did not intentionally fail to adhere to the School District policy established in the Curriculum Guide throughout the 1977-1978 school year. One Observation Report after another pointed out these failures to Mr. Browne. In spite of the Observation Reports and of various plans for improvement, Mr. Browne's performance for the first semester of the 1978-1979 school year as set forth in Finding of Fact No. 76 was even less satisfactory from that of the previous year. It can only be concluded from the record that Mr. Browne had no intention of following the clear and unequivocal requests of his supervisors that he comply with the Curriculum Guide and the school policy with regard to lesson plans and grade books.

Consequently we conclude that sufficient cause has been demonstrated to discharge Mr. Browne as a professional employee for persistent negligence and persistent and willful violation of school laws.

III

Because of the position we have taken with regard to the charges of persistent negligence and persistent and willful violation of school laws, we consider it unnecessary to discuss Appellant's objections based upon the question of his discharge for incompetency.

ORDER

AND NOW, this 8th day of January , 1982, it is hereby ordered and decreed that the appeal of Frederick W. Browne be dismissed and the decision of the Board of School Directors of Abington School District is affirmed.

Robert G. Scanlon

Robert G. Scanlon
Secretary of Education

IN THE OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

GARY L. ANDREWS :
Appellant :
:
v. : Teacher Tenure Appeal No. 25-79
:
LEBANON AREA SCHOOL DISTRICT, :
Appellee :

OPINION

Gary L. Andrews, Appellant herein, has appealed from the action of the Lebanon Area School District removing him from his position as Assistant Elementary Principal of Northwest Elementary School and Principal of Southwest Elementary School and assigning him to the position of sixth-grade elementary teacher at the Northwest Elementary School, which action, taken without his consent, he contends is an improper demotion in position and salary.

FINDINGS OF FACT

1. Gary L. Andrews, Appellant herein, is a professional employee of the Lebanon Area School District. Transcript of Hearing Before School Board, T.B. 27, School District Exhibit 6, Appellant's Petition of Appeal Exhibit "A."

2. Appellant began his employment as an elementary classroom teacher in the Lebanon School District in 1971. He attained professional employee status in 1973 and served in the capacity of elementary classroom teacher until school year 1975-76, T.B. 27, School District

Exhibit 6, Appellant's Petition of Appeal Exhibit "A."

3. By resolution #4611 dated March 17, 1975, the School Board appointed the Appellant to serve as substitute principal at Henry Houck and Garfield Elementary Schools for the 1975-76 school year because Fredric Richter, who served as Principal of those schools, would be away on sabbatical leave. With this appointment, the School Board gave the Appellant an increase in salary. School District Exhibit 1, T.B. 6, 13, 14, Appellant's Petition of appeal Exhibit "B."

4. By letter dated March 18, 1975, Paul C. Dunkelberger, District Superintendent, notified Appellant of the action taken by School Board at its meeting of March 17, 1975, appointing him as acting principal during the period of time that Mr. Richter would be away on sabbatical leave and that his new duties would begin as of September, 1975, and continue through the 1975-76 school year. School District Exhibit 2, Appellant's Petition of Appeal Exhibit "C."

5. Appellant was compensated at the base salary for an assistant ten (10) month elementary principal as established in the School District's Administration Compensation Policy. Appellant's Petition of Appeal Exhibit "B."

6. Appellant understood that his assignment during the 1975-76 school year was temporary in nature since he was substituting for Fredric Richter, who would be away on sabbatical leave. T.B. 28, 32.

7. A new elementary school named Northwest Elementary School was opened at the beginning of the 1976-77 school year. This created two administrative positions that had to be filled: principal and assistant principal. T.B. 14.

8. By Resolution #4827, dated March 15, 1976, the School Board appointed Appellant as assistant Elementary principal for the Northwest

Elementary School beginning in September 1976. Appellant received a salary of $18,000.00 for a ten-month period. School District Exhibit 1. Appellant's Petition of Appeal Exhibit "B."

9. By letter dated March 16, 1976, Paul C. Dunkelberger, District Superintendent, confirmed the School Board's action of March 15, 1976, and notified the Appellant that the School Board appointed him as assistant principal for the Northwest Elementary School effective September, 1976, at a salary of $18,000.00 for the 1976-77 school year. School District Exhibit 3. Appellant's Petition of Appeal Exhibit "D."

10. By Resolution #5131, dated May 16, 1977, the School Board assigned the Appellant to the position of Principal of the Southwest Elementary Building and Assistant Principal of the Northwest Elementary Building because Clark D. Hitchcock would be away on sabbatical leave. School District Exhibit 1. Appellant's Petition of Appeal Exhibit "B."

11. Pursuant to Resolution #5131, Paul C. Dunkelberger, District Superintendent, notified Appellant by letter of his appointment. School District Exhibit 4. (Also referred to as Appellant's Exhibit "E" which was not attached to his Petition of Appeal.)

12. By Resolution #5428, dated July 17, 1978, the School Board transferred the Appellant from the position of Principal of the Southwest Elementary Building and Assistant Principal of the Northwest Elementary Building to the position of elementary classroom teacher effective at the beginning of the 1978-79 school year. School District Exhibit 1. Appellant's Petition of Appeal Exhibit "B."

13. By letter dated July 20, 1978, Paul C. Dunkelberger, District Superintendent, notified the Appellant of the School Board's action assigning him to a teaching position. The Superintendent further noted that the transfer would be effective as of September 1978, and that the salary for the new teaching assignment would be $14,025.00. School District Exhibit 5. Appellant's Petition of Appeal Exhibit "B." T.B. 19-20.

14. At the hearing held before the School Board regarding the Appellant's alleged demotion, the Appellant testified that he had several discussions with the District Superintendent regarding Mr. Hitchcock's return and that he admitted being aware that Hitchcock's return from sabbatical leave could mean the Appellant might have to return to the classroom. T.B. 9, 10, 21, 22, 36-37.

15. Appellant's salary for the 1977-78 school year was $19,991.00 T.B. 21.

16. Appellant's salary for the 1978-79 school year was $14,025.00. School District Exhibit 5. T.B. 19-20.

17. The School Board's action dated July 17, 1978, wherein it reassigned the Appellant from the position of elementary principal to elementary teacher resulted in a change in Appellant's position from principal to teacher and a decrease in salary.

18. On January 10, 1979, the Appellant, by his attorney, Robert J. Eby, Esquire, requested a hearing before the School Board regarding Appellant's alleged demotion.

19. During the 1978-79 school year, Appellant served as a sixth-grade elementary teacher at the Northwest Elementary School. T.B. 30.

20. The Appellant was never issued any other employee contract other than the professional employee contract issued to him on May 21, 1973.

Appellant's Petition of Appeal Exhibit "A." T.B. 28.

21. Between the years 1975 and 1978, Appellant never received a contract from the School Board specifically appointing him to the position of assistant principal or principal. T.B. 28.

22. From school year 1975-76 to 1978-79, the enrollment in the elementary schools of the Lebanon School District was as follows:

1975-1976	2,768
1976-1977	2,702
1977-1978	2,557
1978-1979	2,452

T.B. 26, 27.

23. The School District presented evidence at the hearing indicating that there was a decline in student enrollment, teaching positions were eliminated, fewer elementary buildings were used and fewer elementary principals were needed to administer the schools. T.B. 5, 8, 10, 11, 16, 23, 24, 25, 27.

24. The School District established that due to a decline in student enrollment, it needed only four elementary principals, instead of five, to administer the schools.

25. On August 20, 1979, a hearing was held before the School Board regarding Appellant's alleged demotion.

26. On November 20, 1979, the School Board issued its adjudication with regard to the hearing held on August 20, 1979, and found that:

a. The Appellant had not been demoted.

b. The Appellant was hired in a temporary capacity.

c. The School District's action conformed to the requirements of the School Code.

27. On December 21, 1979, Appellant's Petition for Appeal was filed in the Office of the Secretary of Education.

28. A hearing was held before the Secretary of Education on February 14, 1980. No testimony was presented.

DISCUSSION

The Appellant contends that the action taken by the School Board on July 17, 1978, transferring him from the position of elementary principal to the position of elementary teacher constituted a demotion in salary and position. The Appellant also challenges the procedure followed by the School District in effecting his demotion as being contrary to the provisions of the Public School Code of 1949, as amended, because he claims he never received notice of the School Board's decision of July 17, 1978, by registered mail; he never received a written statement of the charges and/or reasons for his demotion; and, he never received notice from the School Board advising him of his right to a hearing regarding his alleged demotion. Finally, the Appellant contends that the demotion was arbitrary and capricious. Accordingly, the Appellant believes he is entitled to be reinstated to the duties he held immediately prior to his demotion.

The School District contends that no demotion occurred because the Appellant had never been permanently assigned to the position of Principal. Rather, the School District maintains that the Appellant was acting in a substitute capacity from the time he received his first assignment as principal in 1975 to the time it transferred him back to the position of classroom teacher in the summer of 1978. Since his assignments were temporary in nature, the School District contends that no demotion occurred. Furthermore, the School Board believes that the procedures it followed with regard to the Appellant's demotion were in accordance with the provisions of the School Code.

There are two main issues to be decided: whether a demotion occurred; and, whether the action taken by the School Board was in accordance with the School Code.

With regard to the first issue, we conclude that the action taken by the School Board on July 17, 1978, transferring the Appellant from his duties as Principal of the Southwest Elementary School and Assistant Principal of Northwest Elementary School to the position of elementary classroom teacher constituted a demotion in position and salary.

The removal of the Appellant from an administrative position and his subsequent appointment to the position of elementary teacher constituted a demotion in that the action moved the Appellant to a lower position. It also caused a similar reduction in title, status, salary and prestige. "A demotion of a professional employee is a removal from one position and appointment to a lower position; ..." Smith v. Darby, 130 A.2d 661, 664 (1957). See also, Lakeland Joint School District v. Gilvary, 3 Pa. Commonwealth Ct. 415, 283 A.2d. 500 (1971). We hold a demotion has occurred because the record below clearly establishes the Appellant suffered a substantial reduction in salary as well as a corresponding reduction in duties and assignments.

The second issue to be decided is whether action taken by the Board to demote the Appellant was in accordance with the provisions of the School Code.

When a professional employee claims he has been demoted without consent, that employee has the right to request a hearing regarding the alleged demotion and the School Board has a duty to grant a hearing under Section 1151 of the School Code, 24 P.S. §11-1151. At the hearing there are two primary areas of concern. First, the School Board must decide the issue of whether or not the employee suffered a demotion in type of position or salary. Second, the School Board must provide reasons for the demotion that are clear and apparent. Smith v. Darby, 288 Pa. 301, 130 A.2d 661 (1957); Tassone v. School District of Redstone Township, 408 Pa. 290, 183 A.2d 536 (1962). Our concern is with the question of whether the School Board offered clear and apparent reasons for demoting the Appellant, since the issue of whether the Appellant was demoted has already been resolved.

The facts developed at the hearing below indicate the Board offered sufficient justification for its decision to transfer the Appellant from his administrative responsibilities as Principal of Southwest Elementary School and Assistant Principal at Northwest Elementary School to the position of sixth-grade elementary teacher.

The District presented testimony of the School District Superintendent and the Assistant to the Superintendent in charge of personnel to show that the District was suffering a decline in student enrollments, thereby necessitating a reduction in teaching staff. In addition, certain elementary buildings were closed and students were moved into other buildings. Finally, the decline in enrollment caused a corresponding reduction in administrative staff, namely principals. T.B. 5, 10, 14, 16, 23, 26.

The Superintendent testified that the new Northwest Elementary School initially needed two full-time persons but that after it got off to a good start it was unnecessary to retain two people. T.B. 8, 9, 11.

Additional testimony was offered that indicated that between the school years 1975 and 1978, there had been administrative positions at various elementary schools eliminated or created depending on the needs of the District. For example, during school year 1976-1977, the principal positions at Harrison Elementary School and Garfield Elementary were eliminated. T.B. 14.

During the school year 1975-1976, Appellant replaced Fredric Richter, Principal, while he was away on sabbatical leave. During the school year 1976-1977, Appellant was appointed in an administrative capacity at the new Northwest Elementary School because of the need for additional administrative staff. During school year 1977-1978, the Appellant assumed Clark Hitchcock's responsibilities as principal while he was away on sabbatical leave. When Mr. Hitchcock returned from sabbatical leave, the Appellant was transferred back to the classroom. The School District did not need nor could justify having five elementary principals. The mere surplusage of elementary principals was reason enough to justify the demotion. The record also establishes that the Appellant understood that upon Mr. Hitchcock's return, he might have to return to the classroom.

In challenging the validity of his demotion, the Appellant has the heavy burden of showing that the action taken by the Board was not founded upon proper considerations. The Supreme Court of Pennsylvania has established that the actionsof school boards are presumptively valid.

> Executive officers of municipal and school districts have many discretionary powers in performing their functions; ordinarily courts will not interfere with this exercise, but if it appears their action is based on a misconception of law, ignorance through lack of inquiry into facts necessary to form intelligent judgment, or the result of arbitrary will or caprice, courts will intervene to prevent an abuse of power adverse

> to public welfare. Executive officers are clothed with the responsibility of originating and executing plans for the public good; the presumption is that their acts are on such considerations and their decisions reached in a legal way after investigation. When their actions are challenged, the burden of showing to the contrary rests on those asserting it, and it is a heavy burden; courts can and will interfere only when it is made apparent this discretion has been abused. Abuse of discretion does not, as a rule, come from unwise acts or mistaken judgment, but generally springs from improper influences, a disregard of duty, or a violation of law.
> *Hibbs et al., v. Arensburg et al*., 276 Pa. 24, 25, 119 A.727, 728 (1923).

It is well settled law in Pennsylvania that the School Code does not prohibit a school board from demoting a professional employee or reassigning a professional employee to another position in accordance with its judgment and discretion. *Smith v. Darby*, 388 Pa. 301, 130 A.2d 661 (1957). School boards clearly have the power to assign their personnel to other positions and a professional employee has no vested right to any particular position. *Smith*, *Id*; *Appeal of Santee*, 307 Pa. 601, 156 A.2d 30 (1959); *Wesenberg Case*, 346 Pa. 438, 31 A.2d 151 (1943); *Commonwealth ex. rel. Wesenberg v. Bethlehem School District*, 148 Pa. Super 250, 24 A.2d 673 (1942). Also, the courts have consistently upheld the right of a school board to abolish a position or office and transfer and/or assign an employee to a new position. *Smith v. Darby*, 388 Pa. 301, 130 A.2d 661 (1957); *Lakeland Joint School District v. Gilvary*, 3 Pa. Commonwealth Ct. 415, 283 A.2d 500 (1971); *Bilotta v. Secretary of Education*, 8 Pa. Commonwealth Ct. 631, 304 A.2d 190 (1973); *Lucostic v. Brownsville Area School District*. 6 Pa. Commonwealth Ct. 587, 297 A.2d 516 (1972); *Tassone v. School District of Redstone Township*, 408 Pa. 290, 183 A.2d 536 (1962).

Therefore, the school board, in the instant case clearly had the authority to transfer the Appellant from his position as Elementary Principal to the position of classroom teacher.

Also, as part of its responsibility to efficiently administer the public school system within its district, a school board is free to reorganize and realign its staff. *Smith v. Darby*. 388 Pa. 301, A.2d 661 (1957); *Lakeland Joint School District v. Gilvary*, 3 Pa. Commonwealth Ct. 415, 283 A.2d 500 (1971), *Lucostic v. Brownsville School District*, 6 Pa. Commonwealth Ct. 587, 297 A.2d 516 (1972). The record indicates that due to the declining enrollments, the Board consolidated some of the elementary schools under one principal thereby reducing the number of elementary principals it needed in the District. To have retained the Appellant as Elementary Principal clearly would have been costly and unnecessary.

The Appellant contends there was insufficient evidence presented at the hearing to justify the School Board's action. We disagree. We find that the reasons presented by the School Board as set forth in the records below were sufficient to meet its initial burden. Therefore, the Appellant had the burden of proving the Appellee acted in an arbitrary or capricious manner or abused its discretion with regard to the demotion. *Smith v. Darby*, *supra*,; *Lakeland Joint School District v. Gilvary*, 3 Pa. Commonwealth Ct. 415, 283 A.2d 500 (1971); *Lucostic v. Brownsville School District*, 6 Pa. Commonwealth Ct. 587, 297 A.2d 516 (1972). The Appellant has not met this burden in a manner sufficient to justify invalidating the Board's action. He has not offered any evidence to indicate that the action of the Board was arbitrary, capricious, discriminatory or founded upon improper considerations. Therefore, the action of the Board must be sustained.

Appellant's argument that the demotion was improper because it was not based on any deficiency or failing on his part lacks merit because this argument fails to recognize that a school board may demote an employee regardless of his capabilities or job performance. Numerous demotions have been upheld by the courts which were not disciplinary in nature. See, for example, Smith v. Darby, 130 A.2d 661 (1957); Tassone v. School District of Redstone Township, 408 Pa. 290, 183 A.2d 536 (1962); Lucostic v. Brownsville School District, 6 Pa. Commonwealth Ct. 587, 297 A.2d 516 (1972); Bilotta v. Secretary of Education, Pa. Commonwealth Ct. 631, 304 A.2d 190 (1973). The demotion in the instant case was not premised on Appellant's job performance and need not have been.

Finally, we must address the Appellant's argument that his demotion was procedurally defective, thereby rendering it invalid.

The Appellant argues that the demotion was procedurally defective for the following reasons: he did not receive written notice by registered mail of the Board's decision to transfer him on July 17, 1978; he never received a written statement of the charges and/or reasons for his demotion; and, he never received notice from the School Board advising him of his right to a hearing regarding his alleged demotion.

The record clearly establishes that the Appellant had actual written notice of the Board's decision of July 17, 1978, transferring him from principal to classroom teacher. The fact that the notice was not sent registered mail does not invalidate the demotion. First, there is no clear authority either in the Section 1151 of the School Code or in the cases interpreting that section that notice of the Board's decision to demote must be sent registered mail. Even were we to accept Appellant's argument, the Commonwealth Court has announced that notice which is sent by regular mail and is actually received satisfies the statutory requirement of notice by registered mail. Mertz v. Lakatos, 33 Pa. Commonwealth Ct. 230, 381 A.2d 497 (1978). In addition, Appellant acknowledges having received notice of the Board's decision to transfer him and therby suffered no prejudice.

Appellant's argument that the demotion was invalid because he was never advised of his right to a hearing is without merit since he did receive a hearing thereby curing any prejudice he may have suffered initially.

It is true, however, that a demotion cannot become effective until after a hearing is held as required by Section 1151. Black v. Wyalusing Area School District, 27 Pa. Commonwealth Ct. 176, 365 A.2d 1352 (1976). Appellant requests reinstatement and back pay since the Board did not give him a hearing for approximately seven months after one was requested.

In the instant case, the Board's decision to transfer the Appellant from the position of principal to teacher, was to take effect at the beginning of the 1978-1979 school year. However, the Board did not realize that its action amounted to a nonconsensual demotion until January 20, 1979, when the Appellant, for the first time, requested a hearing. The Board did not hold a hearing until August 20, 1979. The reasons for the substantial delay in scheduling a hearing for the Appellant do not appear in the record. We find the demotion is void for the period of delay prior to the hearing conducted before the School Board. Therefore, in this case, Appellant's demotion was void between January 20, 1979, which was the date he requested a hearing and August 20, 1979, which was the date the hearing regarding his demotion was held.

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Since this Opinion upholds the validity of the Board's demotion, yet finds a procedural irregularity as to the timeliness of the hearing provided to the Appellant, we conclude that the Appellant is entitled to back pay between January 20, 1979, and August 20, 1979. *Black*, *Id*.

Accordingly, we enter the following:

ORDER

AND NOW, this 21st day of October, 1980, the Appeal of Gary L. Andrews is hereby dismissed as to the validity of his demotion. The Appeal, insofar as it relates to the issue of back pay as defined above is sustained.

Robt G. Scanlon

Robert G. Scanlon
Secretary of Education

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF EDUCATION

Bernice I. Hamburg, :
Appellant :
v. : Teacher Tenure Appeal No. 26-79
North Penn School District, :
Appellee :

OPINION

Bernice I. Hamburg, Appellant herein, has appealed from the decision of the Board of Directors of the North Penn School District dismissing her as a professional employee on the grounds of incompetency.

FINDINGS OF FACT

1. Bernice I. Hamburg was hired by the North Penn School District beginning her employment October 2, 1967,as an elementary classroom teacher. N.T. 15, School District Exhibit (SD) 1.

2. Ms. Hamburg was a tenured professional employee teaching the second grade at the time that dismissal proceedings were initiated against her by Superintendent M. Ray Kelly on June 20, 1979. N.T. 16, SD-2.

3. On June 20, 1979, Superintendent Kelly notified Ms. Hamburg by registered mail of his intention to recommend her dismissal on the grounds of incompetency based on her unsatisfactory ratings of February 13, 1979, April 20, 1979, and June 15, 1979. SD-4.

4. On June 22, 1979, the Board of School Directors of the North Penn School District (the Board) notified Ms. Hamburg by registered mail that the Superintendent had recommended termination of her contract on the grounds of incompetency based on the three unsatisfactory ratings, and set a hearing for July 5, 1979. SD-5.

5. Hearings were held in twenty-two sessions from July 26, 1979, to November 23, 1979, plus a final meeting on November 30, 1979, for polling the Board, producing a record of over 2,700 pages of testimony plus several hundred pages of exhibits.

6. On November 30, 1979, the Board voted 8-0 to adopt Findings of Fact and an Adjudication discharging Ms. Hamburg. N.T. 2699-2703.

7. All the incidents involving Ms. Hamburg adduced at the hearing will not be repeated. What follows are salient facts proven by credible, substantial evidence which facts are deemed sufficient to uphold Ms. Hamburg's discharge on the grounds of incompetency.

8. Ms. Hamburg received an unsatisfactory year end rating for the 1977-78 school year, on DEBE-333 form dated June 21, 1978, accompanied by anecdotal records, specifically indicating unsatsfactory performance in the "Personality" categories of "emotional

stability", "professional relationships", "judgement", and "habits of conduct". N.T. 231, 443, 1104, 1759, 1825, Letter of Solicitor Potash to Hearing Examiner Rains of April 23, 1980, with DEBE-333 enclosed, Verbal Stipulation of Counsel at Oral Argument before Hearing Examiner.

9. Ms. Hamburg received an unsatisfactory DEBE-333 rating on or about February 13, 1979, specifically indicating unsatisfactory performance in the Personality categories of "exercises (prudent) judgment," "maintains poise and composure", and "maintains professional attitudes". No numerical ratings were given. SD-10. The rating was accompanied by anecdotal records. SD-10 and SD-8.

10. Ms. Hamburg received an unsatisfactory DEBE-333 rating on or about April 20, 1979, indicating unsatisfactory performance in the same areas as the previous ratings. No numerical ratings were given. The rating was accompanied by an anecdotal record, the sufficiency of which was not challenged on appeal. SD-9.

11. Ms. Hamburg received an unsatisfactory DEBE-333 rating on or about June 15, 1979, showing unsatisfactory performance in the same Personality categories. There were both numerical ratings and an anecdotal record. SD-8.

12. Because of Ms. Hamburg's unsatisfactory rating for the 1977-78 school year, Principal Trefsgar and Dr. Westcott, Director of Elementary Education, set forth in writing "Goals for 1978-79" for Ms. Hamburg, dated August 24, 1978. SD-12.

13. These Goals basically were directed toward better rapport with parents and fellow professionals, appropriate handling of children, being a positive model for children, resolving problems directly with the principal, and giving closer attention to details such as lunch count and attendance records. SD-12.

14. During the 1978-79 school year, Ms. Hamburg not only ignored the Goals established for her by the administration, but engaged in on-going battles with the administration in which she often used her second grade students to their detriment. Specific incidents related below.

15. Despite the Goal of closer attention to attendance records, Ms. Hamburg signed her own name to a child's absence excuse where the child's parent was to sign. N.T. 151-152, 2095. SD-13.

16. Despite the Goal of resolving problems with the principal, Ms. Hamburg walked out of a conference with Principal Trefsgar at which he attempted to discuss her mid-year rating. N.T. 261-262.

17. Ms. Hamburg walked out of a conference with Principal Trefsgar, Dr. Westcott, Director of Elementary Education, and Superintendent Kelly on March 1, 1979. N.T. 1372-73.

18. On October 25, 1978, Patricia Gulick, a teacher with 25 years of service in the North Penn School District was having a conference with Principal Trefsgar. Miss Hamburg opened the door and indicated to her to get out. N.T. 194-195, 1670-72.

Jean Ziegler, Principal Trefsgar's secretary, acting as substitute health aide was taking a child's temperature. Miss Hamburg physically grabbed her and despite her protestations to wait until she was finished, took her arm and led her to confront Principal Trefsgar about a complaint involving the two of them. N.T. 1617-1619, 2114.

19. An elementary child had been raped in a nearby school in 1975. Thereafter, the North Penn School District adopted a policy on building security. This included having "windows of all classrooms and office doors clear and unobstructed by paint and paper coverings" and using "a 'buddy' system . . . when children must be used for errands in the building." SD-20. N.T. 293-295.

20. Despite this policy, Miss Hamburg obstructed the windows in her classroom door with papers. N.T. 291.

21. The opening bulletin for teachers states: "DO NOT LEAVE YOUR CLASS FOR ONE MINUTE WITHOUT SUPERVISION." N.T. 1015.

22. Despite the opening bulletin's clear directive, Ms. Hamburg left her class unsupervised on three occasions. N.T. 134, 394, 1211.

23. Miss Hamburg admitted that she personally took a child down to the nurse after Principal Trefsgar told her not to and despite the policy on using the buddy system and the policy against leaving her class unsupervised. N.T. 2061-2062.

24. Despite the policy that children should only leave the room when necessary and should not be left unsupervised, Ms. Hamburg had three of her second graders attempt to use a tape recorder unsupervised in an open space area in the rear of the building. N.T. 126.

25. Principal Trefsgar observed Ms. Hamburg's children out of the classroom unsupervised on several occasions. N.T. 212-214.

26. Throughout the school year, Ms. Hamburg had the habit of telling her children that the principal was denying them various privileges which he had not in fact denied them. For example, in September 1978, Ms. Hamburg took her class to the library without first consulting the librarian who had a kindergarten class in the library at that time. This interrupted the librarian's work with the kindergarten class. Principal Trefsgar, at the librarian's request, asked Miss Hamburg to check with the librarian before bringing her class there. N.T. 255-257. Ms. Hamburg then told the children that Mr. Trefsgar had forbidden them to use the library again. N.T. 333-334. SD-27.

27. In another example, early in the school year, Ms. Hamburg confronted and wrote to the principal asking that her lunch time be strictly honored (i.e. her children not be allowed to return to class until lunch time was over). Subsequently, she alleged that he was refusing to allow her children to return to class during

lunch; that they were upset by his refusal; that she gives up most of her lunch to work with them. N.T. 166-167, 227-229. SD-14 & 16.

28. On March 13, 1979, without any cause, Ms. Hamburg told her class of second graders that she was going to be fired on April 20, 1979. N.T. 2031, 2034. This greatly upset the children. N.T. 1912-1916, 2504, 2591.

29. On March 19, 1979, Dr. Westcott wrote to Ms. Hamburg:

> I am directing you to cease your involvement of children in matters relating to your goals, evaluations, professional relationships, or your conditions of employment in the North Penn School District. R-71.

30. Nevertheless, on April 20, 1979, again without any cause, Ms. Hamburg told her class that she was fired and had them pack up her room. The children were greatly upset. N.T. 1362, 1919, 2504-5, 2560.

31. The children in Ms. Hamburg's class were greatly upset during the latter part of the school year. N.T. 384-8, 2510, 2560, 2591.

32. Despite the Goal that problems be worked out with the principal, Ms. Hamburg called Superintendent Kelly, rather than Mr. Trefsgar, when one child threw a temper tantrum in class near the end of school. N.T. 2206-2207.

33. The situation in Ms. Hamburg's classroom deteriorated to the point that:

Miss Hamburg instructed her children not to talk to the principal. N.T. 1918;

one student was transferred to another class for the last few days of school at his parents' request. N.T. 388, 1925;

a parent wrote to the School Board concerning the situation under the misimpression (created by Ms. Hamburg) that it was Mr. Trefsgar rather than Miss Hamburg who had told the class that she was going to be fired. N.T. 2526-7, SD 85; and

children were frequently crying both in school and at home. N.T. 1912, 2034, 2513, 2570.

DISCUSSION

In addition to challenging the factual findings of the School District, Appellant asserts eight legal reasons for overturning her dismissal. These will be dealt with seriatum, followed by a discussion of the factual issues.

A. Did not the North Penn School District fail to comply with the mandates of the Pennsylvania School Code in the institution of charges against your appellant?

Appellant, Bernice Hamburg, asserts that the notice of charges against her did not amount to "a detailed written statement of charges" as mandated by Section 1127 of the Public School Code, 24 P.S. §11-1127. This argument is not compelling.

The notice mailed to Miss Hamburg (School District Exhibit 5) sets forth that Miss Hamburg's termination has been recommended on the grounds of incompetency based on three unsatisfactory ratings: February 13, 1979 (SD-10), April 20, 1979 (SD-9), and June 15, 1979 (SD-8). Although the actual ratings and anecdotal records were not attached to the notice of charges, there can be no question that Miss Hamburg had already received them. All three ratings bear her signatures, and there was no dispute at the hearing below that she had received them.

The ratings and anecdotal records are certainly sufficiently detailed to give Miss Hamburg adequate notice of the allegations against her. The testimony of the administration in the hearing below was limited to matters set forth in those ratings and anecdotal records, and the Board's findings of fact were similarly limited.

The gist of appellant's argument appears to be that, because the ratings and anecdotal records were not actually attached to the notice of charges or quoted verbatim in them, the notice lacks detail. Appellant would have the Secretary find that it was legally mandated for the School Board to mail to Miss Hamburg again charges of which she had already acknowledged receipt. We cannot conclude that the notice was fatally deficient for failure to photocopy and include materials already in Miss Hamburg's possession; we cannot believe that Miss Hamburg was genuinely unaware of the charges asserted against her which she attempted to refute at such length in the hearing below.

Accordingly, we find that the School Board has met the test enunciated by the Commonwealth Court in Lucciola v. Commonwealth 25 Pa. Commonwealth Ct. 419, 360 A.2d 310 (1976), that:

> As long as the substance of the charges furnished the professional employee refers to one of the valid causes for dismissal under Section 1122, statutory and constitutional procedural requirements are satisfied. A.2d at 312.

B. Was not error committed in the admission and use as evidence of three alleged professional ratings of appellant for the 1978-79 school year?

There are several subparts to appellant Hamburg's opposition to the admission of her three professional ratings for the 1978-79 school year:

1) Issuance of three ratings in one year contravenes the Department of Education's regulation governing ratings which call for one rating each year;

2) Neither the January 31, 1979, nor the April 20, 1979, rating assigns numerical values to any of the categories rated;

3) The June 15, 1979, rating is not substantiated by annecdotal records concerning Preparation, Technique and Pupil Reaction although Ms. Hamburg was given fewer than 20 points in each of these categories; and

4) Therefore appellant did not properly receive two consecutive unsatisfactory ratings prior to her dismissal for incompetence.

The first of these arguments attempts to turn the Department's regulation on its head. Paragraph 3 of "General Rating" in the Standards for Use of DEBE-333 states:

> Professional employees shall be rated a minimum of once each year. (emphasis added) 22 Pa. Code §351.21.

Appellant interprets the word "minimum" to mean "maximum" so as to prohibit ratings more frequently than once each year. The simple answer to this argument is that, as any dictionary will indicate, the word "minimum" denotes the least quantity possible, not the largest.

Certainly, a school district will not be allowed to circumvent the requirement of two consecutive unsatisfactory ratings for a dismissal for incompetency by giving two ratings so close together as to provide insufficient time for improvement. There was no such allegation here, and such was not the case.

Appellant's second argument, that the January and April 1979 ratings are deficient for failure to specify numerical values, has some basis. Paragraphs 5, 6, 7, and 8 of "General Rating" in the Standards for Use of DEBE-333, 22 Pa. Code §351.21, clearly call for numerical ratings in each of the four categories. Neither of these ratings contains numerical scores. However, both ratings comply with paragraph 1 of "Detailed Appraisal for Unsatisfactory Rating" in the DEBE-333 Standards by having a check mark in the block opposite the category designated unsatisfactory. Also, both are signed by the rater in the unsatisfactory column; and appellant does not question that both are accompanied by anecdotal records.

Given this factual background, it is clear that these two professional ratings were admissible in an administrative hearing for the purpose of demonstrating that Miss Hamburg was on actual notice of the District's judgment that her work was unsatisfactory. Furthermore, it is undisputed that Ms. Hamburg received an unsatisfactory rating at the end of the 1977-78 school year. This document, admitted into the record by verbal stipulation at the oral argument before the Secretary's designee, contains numerical ratings in all categories, shows an unsatisfactory rating in Personality, is accompanied by anecdotal records, and is signed by the principal and superintendent. Thus, even if the January and April 1979 ratings were deemed invalid, Ms. Hamburg would have still received two consecutive unsatisfactory ratings: June 1978 and June 1979.

Appellant's third argument, that the June 15, 1979, rating is invalid because there are no anecdotal records supporting the ratings less than 20 in Preparation, Technique and Pupil Reactions, does not appear relevant to this appeal. As the School District cogently argues:

> Ms. Hamburg's performance was determined to be unsatisfactory on the basis of her gross deficiency in the area of personality only. No charges were brought against her relative to the areas of preparation, technique or pupil reaction, in which her performance was deemed marginally satisfactory.
>
> Thus, Ms. Hamburg was clearly not prejudiced by the absence of evidence of anecdotal records relative to those categories in the record of this case. Brief of Appellee, p. 19

Accordingly, there is no merit to Ms. Hamburg's contention that her dismissal is invalid for failure to receive two consecutive unsatisfactory ratings.

C. Was not the Appellant subjected to an improper discriminatory, arbitrary and individual standard of attaining poorly defined and boundless "Goals" for evaluation of her professional performance?

Appellant next contends that it was improper for the School District to judge her against a set of "goals" that were drafted for her in August 1978. In this contention as in her actions during the 1978-79 school year, Ms. Hamburg misses the whole point of these goals.

With the exception of the last sentence of Goal No. 1, which will be discussed in Part D _infra_, the Goals set forth for Ms. Hamburg constituted perfectly ordinary and reasonable requests of any public school teacher. Perforce the rating of any teacher involves subjective judgments on the part of the raters. We do not find that use of these Goals added to the subjective judgments made of Ms. Hamburg. If anything, the Goals should have aided Ms. Hamburg by helping her to focus on specific areas in obvious need of improvement. They are far more specific than the brief categories on the

DEBE-333 rating form.

The fact is that, judged by any reasonable standards, Ms. Hamburg's behavior in the 1978-79 school year amply warranted dismissal.

D. Were not the charges against Appellant premised on an impermissible basis: To Wit, as a reprisal for the exercise of Appellant's constitutionally protected right of free speech?

Ms. Hamburg argues that her dismissal is in reprisal for the exercise of free speech. Although there is no evidence in the record to support a finding of "reprisal", it is clear that certain phone calls, letters and verbal confrontations make up part of the charges against her.

The last sentence of Goal No. 1 of the August 24, 1978, Goals, states:

> All written communications are to be cleared through the office of the building principal.

Although there may have been some policy justification for this goal--an effort to have Ms. Hamburg deal directly with the principal concerning classroom problems rather than constantly bypass him--it is certain that this goal constitutes an overbroad interference with free speech.

The right of teachers to free speech is recognized in a long line of cases, most recently Givhan v. Western Line Consolidated

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School District, 439 U.S. 410, 99 S. Ct. 693, 58 L.Ed 2d 619 (1979), which extended this protection to private conversations between a teacher and her principal. The free speech rights of teachers are not without limitation. For example, in Mt. Healthy School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), although the Court found the teacher's phone call to a local radio station to be protected, it did not extend that protection to arguments with school cafeteria employees, referring to students using obscene terms, and making an obscene gesture to two girls. In this situation in which the Court found that a teacher's dismissal was based upon both protected and unprotected activity, the Court stated this rule:

> . . . the burden was properly upon respondent to show that this conduct was a "substantial factor'--or to put it in other words, that it was a "motivating factor" in the Boards' decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct. U.S. at 287, S.Ct. at 576.

Applying this rule to the instant appeal, it is abundantly clear that even in the absence of the protected conduct, Ms. Hamburg engaged in a course of conduct during the 1978-79 school year--as set forth in the findings of fact--which would have necessitated her termination by the Board.

E. Did not the Board commit an error of law and deprive the Appellant of a fair and impartial hearing by the exclusion of a witness subpoenaed by Appellant?

Ms. Hamburg asserts that by excluding the testimony of one of her witnesses, David F. McCoach, the Board violated Section 1127 of the School Code:

> ". . . At such hearing all testimony offered including that of . . . the accused professional employee and his or her witnesses, shall be recorded by a competent stenographer . . ."

and Section 1129 of the School Code:

> "After fully hearing . . . all witnesses produced by . . . the person against whom the charges are pending, and after full, impartial unbiased consideration thereof, the Board . . ."

In this argument Ms. Hamburg is attempting to reduce the School Code to an absurdity, requiring school boards to hear testimony from any witnesses offered by a teacher no matter how irrelevant, collateral or cumulative. These provisions of the School Code have never been so interpreted by the Courts, nor should they be.

At the outset, it must be noted that Ms. Hamburg's hearing before the School Board was of prodigious length. There were twenty-three sessions producing a transcript of over 2,700 pages. Ms. Hamburg's attorney was given every reasonable opportunity to produce witnesses on her behalf and cross-examine administration witnesses. (His cross-examination of the principal alone occupies over 800 pages of transcript.)

Ms. Hamburg's attorney attempted to introduce evidence of one Dale F. McCoach. In an offer of proof, her attorney set forth that Mr. McCoach would testify as to an incident between Mr. McCoach and Principal Trefsgar in February 1973. Mr. Salkin, acting as legal adviser to the Board, upheld the administration's objection to this testimony on the grounds that it would open up a collateral issue.

This ruling was proper. Mr. Trefsgar had previously acknowledged the incident with Mr. McCoach on cross-examination. Nt. 737. Mr. Trefsgar's conduct was appropriately not the issue at Ms. Hamburg's hearing. One incident in 1973 would not, in any event, establish a course of conduct relevant to the 1978-79 school year. Nor, even if there was such a course of conduct, would it excuse or justify Ms. Hamburg's actions during the 1978-79 school year.

F. Do the charges under the law constitute the Charge of Incompetency?

Ms. Hamburg argues that:

> ". . . a concession of prove (sic) as to any and all of the allegations would not constitute a substantiation of an incompetency charge within the context of Section 1122 of the Pennsylvania School Code." Appellant's Brief in Support of Appeal To The Secretary of Education, p. 55.

We do not find this argument persuasive. Although the School Code does not define incompetency, the Pennsylvania Supreme Court has provided a settled and quite broad definition of the term in this context. In Horosko v. Mount Pleasant School District, the Court stated:

> "The term 'incompetency' has a 'common and approved usage'. The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give much wider meaning. For example, in 31 C.J., with reference to a number of supporting decisions, it is defined: 'A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of ability, legal qualifications, or fitness to discharge the required duty.' In Black's Law Dictionary (3rd edition) page 945, and in Bouvier's Law Dictionary, (3rd revision) p. 1528, it is defined as 'Lack of ability or fitness to discharge the required duty.'
> . . .
> Webster's New International Dictionary defines it as a 'want of physical, intellectual or moral ability; insufficiency; inadequacy; specif., want of legal qualifications

> or fitness.' Funk & Wagnalls Standard Dictionary defines it as 'General lack of capacity of fitness, or lack of the special qualities required for a particular purpose.'"
>
> 335 Pa. 369, 374-75, 6 A.2d 866, 869-70 (1939).

Accord, Steffen v. South Middletown Board of School Directors, 32 Pa. Commonwealth Ct. 187, 191-192, 377 A.2d 1381, 1384 (1977).

In Steffen, the Commonwealth Court further notes:

> This Court has stated that failure to maintain adequate classroom control is serious enough, without more, to warrant an unsatisfactory rating for a teacher. English v. North East Board of Education, 22 Pa. Cmwlth. 240, 348 A.2d 494 (1975). In the instant case, not only was Steffen lacking in the ability to properly instruct and motivate students, but he maintained little or no disciplinary control over them. Commonwealth Ct at 192, A.2d at 1384.

As set forth in the Findings of Fact and in Section I below, it is evident from the voluminous testimony that Miss Hamburg failed to maintain adequate classroom control and lacks fitness to discharge the required duties of a school teacher. These findings are in accord with the allegations against Miss Hamburg, and accordingly dismissal for incompetency is warranted.

G. Were not the unsatisfactory ratings relied upon by the North Penn School District the product of discriminatory, arbitrary and contrived conduct and procedures pursued maliciously?

Appellant Hamburg argues at length that the evidence shows "a pattern of administrative harassment and guile which should bear on the weight and credibility to be accorded the School Administration's testimony." Appellant's Brief In Support of Appeal to the Secretary of Education, p. 56. Appellant then recounts her litany of many perceived wrongs at the hands of the administration going back to 1970. In this argument as at her hearing in general, Miss Hamburg seeks to attack members of the school administration rather than defend or explain her own actions vis-a-vis the children in her classroom in the 1978-79 school year.

There is nothing in Miss Hamburg's history of complaints which inclines us to overturn the School Board's findings of credibility. Indeed, in many instances the testimony of the administration's witnesses are confirmed not only by appellant's witnesses, but also by appellant herself. As is set forth at length in the Findings of Fact and in Section I, below, the credible evidence does not support a finding of "discriminatory, arbitrary and contrived conduct and procedures pursued malicously" by the administration, but rather incompetency on the part of Miss Hamburg.

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H. Was not the Appellant deprived of Due Process and a fair and impartial hearing by the excessive allowance of inflammatory and prejudicial hearsay?

Without citing any example, appellant asserts that hearsay evidence was repeatedly allowed at her hearing depriving her of due process and a fair and impartial hearing. Appellant refers to case law for the proposition that hearsay evidence, properly objected to, is not competent to support a finding of the Board.

Other case law indicates:

> . . . an adjudication of an administrative agency may not be founded wholly on hearsay evidence, although such evidence may be admitted in cases made out by circumstantial evidence, if not inconsistent with the undisputed facts, for the additional light it may throw on the matter. (citations omitted.) Bleilevens v. State Civil Service Commission, 11 Pa. Commonwealth Ct. 1, 5, 312 A.2d 109, 111 (1973).

Applying either rule, we find no violation of Miss Hamburg's rights. As set forth in the Findings of Fact and in Section I below, a finding of incompetency is clearly indicated not only on the basis of direct testimony of administration witnesses, but also on her own testimony and that of her own witnesses, which only tended to corroborate the adminstration's allegations.

I. Does the testimony fail to warrant the dismissal of Appellant for the reason of incompetency?

Lastly, appellant argues that the charge of incompetency is not supported by the evidence adduced at the hearing. We find that this charge has been abundantly demonstrated.

No effort has been made in the Findings of Fact herein to relate all the incidents involving Miss Hamburg in the 1978-79 school year, her lack of cooperation with the administration, her devastating effect upon morale at Hancock Schook, her efforts to intimidate parents, fellow teachers and supervisors.

The testimony, including that presented on behalf of Miss Hamburg, demonstrates that she repeatedly failed to supervise her children properly, failed to obey instructions relating to security of the building and safety of children, repeatedly failed to even attempt to work out problems directly with her principal to the point of walking out of conferences, told her children untruths that the principal was denying them various privileges, falsely told her children that she was being fired in April, and had her children dismantle her classroom in April, all this causing extreme upset to the children.

She herself admitted on the hearing stand many of these actions. Her witnesses corroborated their children's upset.

There can be no justification for this lack of supervision and cruel misuse of her second graders by Miss Hamburg. Her own admissions clearly verify a lack of fitness and qualities to be a teacher, not only her lack of classroom control, but her devastating effect upon the children with those care she was entrusted.

ORDER

AND NOW, this 19th day of September , 1980, it is hereby Ordered and Decreed that the decision of the School Board of the North Penn School District dismissing Appellant on the ground of incompetency be sustained.

Robert G. Scanlon
Secretary of Education

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